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No. —

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should resolve the conflict among lower federal courts as to when insurance coverage is triggered for claims arising from asbestos-related diseases when:

   a. The courts in exercising diversity jurisdiction have applied the same general principles of state law to standard comprehensive insurance policies used throughout the nation and have reached mutually irreconcilable results; and

   b. The ensuing conflict is having adverse consequences on the administration of justice in literally thousands of cases for which potential recoveries run into the hundreds of millions of dollars.

2. Whether a federal court in the exercise of diversity jurisdiction, having been presented with an interpretation of coverage (the manifestation interpretation) that is well-established in state law, is free to disregard it and substitute therefor what it thinks is a better or superior interpretation.

3. Whether, under the general principles of state law that should be applied to the interpretation of standard comprehensive insurance policies, coverage is triggered when:

   a. An asbestos-related disease is first diagnosed or otherwise manifests itself (*i.e.*, the "manifestation interpretation"); or

   b. The claimant was exposed to airborne asbestos regardless of when signs or symptoms of disease first developed (*i.e.*, the "exposure interpretation"); or

   c. In either or both of the foregoing events as well as during the time that inhaled asbestos re-

mained "in residence" in the lungs (*i.e.*, the "D.C. Circuit interpretation").

4. Whether, if some form of exposure theory is adopted, the insured should bear the pro rata cost for defense and indemnity for those portions of a claimant's period of exposure for which the insured had no insurance coverage.

LIST OF PARTIES

Petitioner Insurance Company of North America ("INA") was a defendant in the district court and an appellant and cross-appellee in the District of Columbia Circuit. Respondent Keene Corporation ("Keene") was the sole plaintiff in the district court and an appellant and cross-appellee in the District of Columbia Circuit. There were four additional defendants in the district court: Aetna Casualty & Surety Company ("Aetna"), Liberty Mutual Insurance Company ("Liberty"), Hartford Accident & Indemnity Company ("Hartford"), and Pennsylvania Manufacturers Association Insurance Company ("PMA"). Aetna and Liberty were appellants and cross-appellees in the District of Columbia Circuit. Hartford was an appellee in the District of Columbia Circuit. PMA was dismissed from the case in the district court and that dismissal was the subject of a separate appeal to the District of Columbia Circuit. The Rule 28.1 list of corporations affiliated with Petitioner INA appears in Appendix F to this Petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner INA respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the District of Columbia Circuit entered on October 1, 1981.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit appears in Appendix A and is not yet reported. The Opinion and Judgment of the United States District Court for the

District of Columbia appears in Appendix B and is reported at 513 F. Supp. 47.

JURISDICTION OF THIS COURT

The Opinion and Judgment of the District of Columbia Circuit was entered on October 1, 1981. Appendix A, at 22. On November 19, 1981, petitions for rehearing and suggestions for rehearing *en banc* were denied. Appendix A, at 46a-49a. Jurisdiction to review the judgment is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section II, Clause 1 of the Constitution of the United States provides:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other Public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Rules of Decision Act, 28 U.S.C. § 1652 (1976), provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

A. Background.

The instant case, like the cases now pending for certiorari, *Forty-Eight*[1] and *Porter*,[2] is part of an avalanche of asbestos-related litigation. There are literally thousands of cases now in the courts in which claimants contend that they were injured by exposure to products that contained asbestos.[3] Even the most conservative estimates of potential recoveries run into the hundreds of millions of dollars.[4]

In these cases, claimants generally allege that they were exposed to the products of ten or more manufacturers over periods of from 10 to 30 years or more. Usually the defendant manufacturers have been insured by different insurers during parts of the exposure period. During other parts they may well have had no insurance at all.

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[1] *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *modified on rehearing*, Nos. 78-1322-1326 (Mar. 5, 1981) *petition for cert. filed*, 50 U.S.L.W. 3023 (U.S. July 31, 1981) (Nos. 81-198-199).

INA is the petitioner in No. 81-198. INA will not repeat in this Petition all the arguments for certiorari that it has already made in its petition in *Forty-Eight*. While continuing to rely on them, INA points out in this Petition that this Court's review is now needed even more because the *Erie* and other problems that were the focus of the earlier petition have been exacerbated by the contorted and conflicting decision that has been rendered by the District of Columbia Circuit in the instant case.

[2] *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir.) *petition for cert. filed*, 50 U.S.L.W. 3024 (U.S. July 31, 1981) (No. 81-200).

[3] It has been estimated that 12,000 product liability claims against asbestos manufacturers had been filed in state and federal courts by mid-summer of 1981, with the number increasing at the rate of 400 a month. *N.Y. Times*, July 3, 1981, § 1, at 1, col. 1.

[4] *See Legal Times of Washington*, October 12, 1981, at 1, col. 1.

Under *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), manufacturers of asbestos-containing products can be held jointly and severally liable for asbestos-related diseases that were caused, in part, by their products. In these circumstances, various manufacturers and their insurers have sought declaratory judgments of their respective rights and obligations under standard comprehensive general liability insurance contracts that contain virtually identical coverage provisions.

These declaratory judgment actions, which are in the federal courts because of diversity of citizenship, present the most critical issue that must be decided at this stage of the era of asbestos litigation—and the one that will determine the future course of the thousands of asbestos-related cases that have been and will be instituted. That issue is which, if any, of the manufacturers' insurers is obligated to defend and indemnify the manufacturers in the underlying asbestos lawsuits. Although virtually the same policy language and the same general principles of state law are involved, three mutually inconsistent and conflicting answers have been given by the Sixth and Fifth Circuits in *Forty-Eight* and *Porter*, respectively, the District Court for the District of Massachusetts in *Eagle-Picher*,[5] and the District of Columbia Circuit in the instant case.

The situation of Keene,[6] the respondent in the instant case, is virtually identical to that of other manufacturers of asbestos products, including the manufacturers that were parties in *Forty-Eight*, *Porter*, and *Eagle-*

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[5] *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, Civil Action No. 78-2739-Z (D. Mass. Aug. 14, 1981), *appeals docketed*, Nos. 81-1761-1763 (1st Cir. Sept. 25, 1981). The opinion in *Eagle-Picher* appears in Appendix C to this Petition.

[6] As used herein, the term "Keene" includes both Keene Corporation and its predecessor companies.

Picher. Keene, along with other manufacturers of asbestos products, has been named a defendant in over 6,000 lawsuits in which the plaintiffs contend that they were exposed to asbestos products over extended periods of time. During part of the time that it manufactured asbestos products Keene had no insurance. During other parts Keene purchased insurance from different insurance companies.

When Keene had insurance, its policies contained the same standard industry-wide coverage provision that was in the policies issued to other asbestos manufacturers, including those involved in *Forty-Eight*, *Porter*, and *Eagle-Picher*. Each of Keene's policies—which Keene contends were in effect *seriatim* beginning November 1, 1948—set forth language identical or similar to the following:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent. . . .
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> * * * *
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> "Bodily injury" is defined as "bodily injury, sickness or disease sustained by any person," . . . and "occurrence" is defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury. . . ."[7]

B. The Conflicting Federal Decisions.

The questions in dispute in each of the declaratory judgment actions filed by manufacturers and insurers have been identical: (1) when are asbestos-related diseases sustained or when do they occur under the standard

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[7] *Keene* Op., App. A at 6a (emphasis deleted).

policy language so as to trigger coverage; and (2) how should liability be apportioned in the event that the answer to question (1) results in more than one entity being liable? Although construing virtually identical standard general liability policies and purporting to follow the same general principles of state law, the federal courts have answered these questions in widely divergent ways.

The United States District Court for the District of Massachusetts, in *Eagle-Picher*, applied the traditional approach followed by state courts to determine when disease is sustained or occurs for purposes of insurance coverage. That approach is the manifestation interpretation. It holds that asbestos-related disease is sustained or occurs at the time it first produces clinically evident diagnosable disease (that is, when it manifests itself). Under the manifestation interpretation, only one entity is liable in each underlying tort suit, and the administration of each suit is both simple and straightforward.[8]

Although acknowledging that "there are solid arguments to support the manifestation theory,"[9] the Sixth Circuit, in *Forty-Eight* (and the Fifth Circuit, derivatively in *Porter*[10]) nonetheless rejected it. Citing "policy considerations" and its own "view" as to what was "bet-

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[8] The court in *Eagle-Picher*, applying the same principles of state law as were found applicable in *Forty-Eight*, *Porter*, and *Keene* concluded that they "dictate[d]" the manifestation interpretation. *Eagle-Picher* Op., App. C at 76a. However, "because other courts have come to different conclusions," the court went on to discuss "[a]n additional strand of support" for its decision based on public policy. *Id.* at 74a, 76a. Because the contractual rights and obligations of the parties were clear and unambiguous, that discussion, as the court itself implicitly acknowledged, was *dictum*.

[9] 633 F.2d at 1218.

[10] The Fifth Circuit, in *Porter*, adopted both the holding and reasoning of *Forty-Eight*.

ter," [11] the court held that asbestos-related diseases are sustained or occur for purposes of insurance coverage whenever exposure to asbestos-containing products produced microscopic insults to the lung of the claimant, irrespective of when signs or symptoms of the disease first developed. Under the court's exposure interpretation, asbestos-related disease is deemed to occur over the entire period of a claimant's exposure to asbestos, thereby rendering numerous insurers liable and entitled to control the defense and possible settlement of each underlying tort suit. The court also held that the liability of these insurers should be limited to their pro rata shares (number of years for which they offered coverage during the exposure period divided by the total number of years of exposure), with the manufacturer liable on a similar pro rata basis for any time during the exposure period in which it was uninsured.

In *Keene*, the District of Columbia Circuit has set forth yet another interpretation of the same policy language.[12] Although the court prefaced its decision with the assertion that "potentially applicable state laws do not differ from one another," [13] it then proceeded to apply no state's law. Instead, it announced a novel and unprecedented policy interpretation never before held by any state or federal court. Based on its view that the insured should be "free of all liability for asbestos-related disease," the court concluded that not only manifestation of disease but also "inhalation exposure and exposure in residence" should be deemed to trigger coverage under the policies and that insurance companies should be liable even for indemnity and defense costs attributable to pe-

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[11] 633 F.2d at 1220, 1222.

[12] Per Senior Circuit Judge Bazelon (joined by Circuit Judge Wilkey, with Circuit Judge Wald concurring in part). In so doing, the court reversed the decision of the District Court which had essentially adopted the holding in *Forty-Eight*.

[13] *Keene* Op., App. A at 10a n.10.

riods during which the manufacturer chose not to purchase insurance.[14] One member of the panel (Wald, J.) dissented from that portion of the court's decision that absolved the manufacturer from all liability.[15]

REASONS FOR GRANTING THE WRIT

A. There Is a Square Conflict Among Federal Courts as to the Application of Uniform State Law that Adversely Affects the Administration of Justice and Violates the Principles of *Erie Railroad Co. v. Tompkins*.

INA stated in the certiorari petition it filed in *Forty-Eight*:

> "Left unreviewed, the ruling can become an ill-advised precedent allowing federal courts to devise a hybrid of federal common law . . . Such a development would severely impugn the integrity of *Erie* and would strain the fragile relationship between state and federal courts regarding development of state substantive law." At 19-20.

That prediction, it can now be seen, seriously underestimated what has actually occurred. Following the example of the court in *Forty-Eight*, the District of Columbia Circuit in *Keene* felt free to devise its own highly idiosyncratic hybrid of federal common law. What this Court now has before it is not merely the arguably aberrational decision of one court (the Sixth Circuit in *Forty-Eight*) that has been blindly followed by another (the Fifth Cir-

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[14] *Keene* Op., App. A at 26a, 23a, 24a.

[15] *Keene*, *Forty-Eight*, *Porter*, and *Eagle-Picher* are not the only cases to consider these issues. For example, in *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, Civil Action No. 81-2129, the United States District Court for the Eastern District of Pennsylvania issued an order dated October 29, 1981, granting motions for summary judgment and partial summary judgment that apparently adopted a form of the exposure interpretation. That Order appears in Appendix D to this Petition. Set forth in Appendix E are citations to 18 other cases in federal and state courts presenting the same basic questions of coverage in asbestos cases.

cuit in *Porter*). Instead, it is faced with mutually inconsistent decisions of several federal courts that vary not because of any perceived difference of state law, but because of the respective courts' own notions of policy and the equities involved. In these circumstances, a uniform federal decision correctly applying uniform state law is needed. Only this Court can satisfy that need. Left unresolved, the present chaotic situation adversely affects the administration of justice and violates the principles of *Erie*.

1. The Need for a Uniform Federal Decision.

The conflicting decisions in *Keene*, *Forty-Eight*, *Porter*, and *Eagle-Picher* provide different and mutually inconsistent formulae for apportioning defense costs and ultimate liability under standard insurance policies in effect throughout the nation. If left standing, these decisions can only result in a spate of forum shopping, the retardation of settlements, and the imposition of unwarranted and unnecessary confusion upon claimants, manufacturers, and insurers alike.

To cite but one illustrative example, what will happen if a claimant, having been exposed to the products of each of two asbestos manufacturers, were now to sue both manufacturer A and manufacturer B? Further assume that manufacturer A was insured at various times by Affiliated FM Insurance Company, Illinois National Insurance Company, Travelers Indemnity of Rhode Island, INA, and Liberty (parties in *Forty-Eight*), and that manufacturer B was insured at various times by Aetna, Hartford, INA, and Liberty (parties in *Keene*). According to the conflicting federal decisions that now govern, Affiliated FM, Illinois National, and Travelers would be responsible only for their pro rata shares of defense costs and ultimate liability; Aetna and Hartford would each be responsible for the total costs and liability; INA and Liberty would be completely at a loss to determine their liability; and manufacturer A and manufacturer B might or might not be required to bear some share of the costs.

Petitioner acknowledges that this Court has stated that "[a]s to questions controlled by state law, . . . conflict among circuits is not of itself a reason for granting a writ of certiorari," *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938). But that statement was itself addressed to conflicts that are "merely corollary to a permissible difference of opinion in the state courts." *Id.* at 206.

Keene, *Forty-Eight*, *Porter*, and *Eagle-Picher* do not present the ordinary situation posited in *Ruhlin*. They interpret virtually identical contractual language in radically different ways. Although each case rests on diversity jurisdiction, each court explicitly applied the same general principles of state law as the others, and expressly held either that there was no conflict of laws or, at most, a false conflict.[16] In sum, each court has concluded that the same general principles of state law apply in all relevant states. Yet, they have split widely in their interpretation of virtually identical insurance policy language. Accordingly, review by this Court is needed to assure that there is a uniform federal application of uniform state law in accordance with the Rules of Decision Act. 28 U.S.C. § 1652 (1976); *see e.g.*, *Magnum Import Co. v. Coty*, 262 U.S. 159, 162 (1923).[17]

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[16] In *Keene*, the District of Columbia Circuit concluded that the law was the same in every relevant state, *i.e.*, Delaware, New York, Pennsylvania, Connecticut, Massachusetts, and the District of Columbia and that there was a "false conflict." *Keene* Op., App. A at 10a n.10. In *Forty-Eight*, the Sixth Circuit found that the laws of Illinois and New Jersey applied, and that those states followed universal principles of construction. 633 F.2d at 1219. In *Eagle-Picher*, the court likewise concluded that there was "no true conflict among all potentially applicable laws," *i.e.*, the laws of Ohio, Illinois, and England. *Eagle-Picher* Op., App. C. at 72a n.5. In *Porter*, the Fifth Circuit concluded that Louisiana law applied but never referred to any law of Louisiana and simply adopted the holding in *Forty-Eight*. 641 F.2d at 1145.

[17] Certiorari is appropriate to resolve conflicts of decision in those rare instances in which Circuit Courts have rendered inconsistent decisions interpreting the same law in the same context. *E.g. Maryland v. United States*, 381 U.S. 41, 43 (1964), *vacated*

2. The Need to Enforce the *Erie* Obligation.

The various courts are correct in their assessment that the laws of the states are in agreement. None of the courts has even suggested that the solution to the coverage dispute turns on the selection of the law of one state to the exclusion of the law of others. The divergence among them results directly from their disregard of the principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

The *Erie* obligations of the *Keene* court should have been simplified by the uniformity of state law. Instead, the court interpreted the lack of conflict among states as a license to decide the issue on its own notions without regard to any state law. The court's opinion in *Keene* is reminiscent of, and in its own way is as pernicious as, the free-wheeling "engrafting their own notions" that this Court severely criticized in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978).[18]

Such a complete repudiation of *Erie*, as occurred in *Keene*, warrants this Court's review. As demonstrated in the succeeding sections of this Petition, the District of Columbia Circuit's opinion is nothing but a discussion of the contract interpretation that the court itself prefers. *Swift v. Tyson*[19] might permit such a decision. *Erie* does not.

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on other grounds, 382 U.S. 159 (1965) (certiorari granted where circuit courts rendered conflicting decisions based on the same trial record); *Transparent-Wrap Machine Corp v. Stokes & Smith Co.*, 329 U.S. 637 (1947) (certiorari granted to resolve apparent conflict on validity of patent).

[18] *Keene* is even more affronting to *Erie* principles than the Sixth Circuit's decision in *Forty-Eight*. At least the Sixth Circuit recognized that state law was to control its decision. Its *Erie* error was its failure to explore all available data for the purpose of determining how state courts would decide the issue. Rather than exploring state law, the Sixth Circuit made its own federal inquiry as to what it thought the superior contract interpretation to be and applied its interpretation vicariously as the controlling state law.

[19] 41 U.S. (16 Pet.) 1 (1842).

B. The Decision of the District of Columbia Circuit, and the Decisions of the Sixth and Fifth Circuits, Are Wrong as a Matter of State Law and Require Correction Because of Their Adverse Consequences on the Administration of Justice.

The District of Columbia Circuit and the Sixth and Fifth Circuits have rejected a considerable, well-developed, uniform, and directly relevant body of state law that has been formulated over the years to interpret insurance contracts in a variety of analogous contexts. Each has substituted therefor its own subjective and highly idiosyncratic approach to the interpretation of these insurance contracts.

1. The manifestation interpretation is the traditional and time-tested approach to determine when diseases occur for purposes of insurance coverage.

The precise question in dispute is when disease—in this case asbestos-related disease—is sustained or occurs so as to trigger coverage. The question of when disease is sustained or occurs is not new; its answer is hornbook law. Numerous cases interpreting terms virtually identical to those in these policies have established the principle that, for purposes of insurance coverage, diseases occur at the time that they first produce signs or symptoms that can be detected by the claimant or his physician.[20]

The manifestation interpretation is traditional, reasonable, and fully consistent with the terms and the intent of the policies. It has been applied by state courts not

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[20] "Annotation: Insurance—Inception of Sickness," 53 A.L.R.2d 686, 689 (1957) ("Illness, disease, or disability will ordinarily be deemed to have its inception when it first becomes manifest or active or when there is a distinct symptom or condition from which one learned in medicine can with reasonable accuracy diagnose the disease."). (Collecting cases.)

only to diseases, but to physical conditions and cancers.[21] The manifestation interpretation has, moreover, been applied uniformly; when diseases manifest themselves during a policy period coverage is found[22] and when they do not coverage is denied.[23] As the Court in *Eagle-Picher* concluded, the manifestation interpretation is clearly applicable to asbestos-related diseases:

> "[The medical testimony], combined with the ordinary meaning of the coverage language, leads to the conclusion that exposure to asbestos results in 'personal injury' when it produces clinically evident diagnosable disease, that is, when it becomes manifest." Op., App. C. at 74a.

Significantly, notwithstanding their respective rejections of it, both the Sixth Circuit in *Forty-Eight* and the District of Columbia Circuit in *Keene* conceded that the manifestation interpretation is both reasonable and con-

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[21] *E.g., Broccolo v. Horace Mann Mut. Cas. Co.*, 37 Ill. App. 2d 493, 186 N.E.2d 89 (1962) (gynecological disease); *Kissil v. Beneficial National Life Ins. Co.*, 64 N.J. 555, 319 A.2d 67 (1974) (cystic fibrosis); *Reiser v. Metropolitan Life Ins. Co.*, 262 A. D. 2d 171, 28 N.Y.S.2d 283 (1941), *aff'd*, 289 N.Y. 561, 43 N.E.2d 534 (1942) (calcium deposits); *Old Southern Life Ins. Co. v. Moore*, 44 Ala. App. 183, 204 So. 2d 828 (1967) (kidney stones); *American Motorists Ins. Co. v. E.R. Squibb & Sons, Inc.*, 95 Misc.2d 222; 406 N.Y.S.2d 658 (Sup. Ct. 1978) (cervical cancer); *Craig v. Central National Life Ins. Co.*, 16 Ill. App.2d 344, 148 N.E.2d 31 (1958) (uterine cancer).

The manifestation interpretation is not confined to health insurance cases. As the courts in *Keene* and *Forty-Eight* acknowledged, manifestation is the general rule of interpretation for the purposes of the statute of limitations, *e.g., Urie v. Thompson*, 337 U.S. 163 (1949), as well as for determining coverage in workmen's compensation cases, *e.g., Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955).

[22] *E.g., American Motorists, supra* note 21 (coverage found because claimant's sickness became manifest during policy period).

[23] *E.g., Broccolo, supra* note 21 (coverage denied because claimant's sickness became manifest prior to policy period).

sistent with the language of the policies. The Sixth Circuit stated: "[w]e concede that [the proponents of the manifestation interpretation] have a good argument," 633 F.2d at 1218, and "there are solid arguments to support the manifestation theory." *Id.* at 1219. The District of Columbia Circuit stated: "[I]f the purpose of the policies is not to be undercut, the manifestation of disease must constitute an 'injury'." Op., App. A at 20a.

2. The interpretations put forward by the District of Columbia Circuit and the Sixth and Fifth Circuits do not withstand scrutiny.

Having been presented with the well-established manifestation interpretation, and having conceded its reasonableness, each court nonetheless launched off in new and mutually inconsistent directions designed to produce results drastically different from those called for by the long-established manifestation interpretation. When reduced to its essential logic, each decision is purely result-oriented and designed to achieve maximum coverage for the insured regardless of the applicable principles of state law and the terms of the governing policies. To reach that result, each court resorted to contorted reasoning that does not withstand even minimal scrutiny.

The approach taken by the District of Columbia Circuit is the most indefensible. That court begins with an "indispensable initial premise" that "[t]he insurance policies provide Keene with the right to be free of all liability for asbestos-related disease. . . ." Op., App. A at 26a & n.29. This initial premise makes the court's decision a foregone conclusion. The specific terms of the policies and the logical consequences of those terms are overridden by this "initial premise". Thus, the court concludes that "[t]o accept the argument that *only* manifestation triggers coverage . . . would deprive Keene of the protection it purchased when it entered into the insurance contracts." Op., App. A at 22a (emphasis in original). The

court's reasoning is completely backwards. Instead of starting with the terms of the policies to derive the rights and obligations of the parties, the court starts with an "initial premise" that is inconsistent with the terms of the policies, and, therefore, rejects the logical consequences of those terms.

Having ignored the terms of the insurance policies, the court compounds its error by ignoring the case law interpreting those terms and policies. The court cavalierly states that the large body of case law adopting the manifestation interpretation of insurance policies "is only minimally relevant to the question at hand." Op., App. A at 17a. Although the court acknowledges that the "health insurance cases" that have adopted the manifestation interpretation are more relevant to this case than others (Op., App. A at 16a n.17), it then dismisses them with the cryptic comment: "[t]he only problem in those cases, however, is to determine when a disease begins in order to decide whether it began during a policy period." *Id.* But, that is, of course, precisely the question presented in these cases: during what policy period do asbestos-related diseases occur for the purpose of insurance coverage.[24]

The most startling result of the court's repudiation of established state law is its conclusion that manufacturers should be absolved from all liability in these cases, even when they elected to have no coverage. As Judge Wald noted in her partial concurrence:

> "I just do not understand why an asbestos manufacturer, which has consciously decided not to insure itself during particular years of the exposure-manifestation period, should have a reasonable ex-

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[24] The District of Columbia Circuit also attempts to distinguish health insurance cases by arguing that they have applied the manifestation interpretation only in order to find coverage. That is incorrect. The manifestation interpretation has been applied both to find and deny coverage. *See* notes 22 and 23 *supra*.

> pectation that it would be exempt from any liability for injuries that were occurring during the uninsured period."
>
> * * * *
>
> "If the risk is to be shared only by the insurance companies, a manufacturing company that purchased insurance intermittently during the risk period would be as secure as those prudent companies that continually purchased insurance." Op., App. A at 44a-45a.

Finally, the result in *Keene* is totally unsatisfactory in its practical effects. It will spawn more litigation than it can hope to settle as insurers in follow-up lawsuits "dispute . . . allocation of their liability" and "try to prove that there was no inhalation of . . . asbestos during or before [their] policy period."[25]

The approach followed by the court in *Forty-Eight*, while not as egregious as that taken in *Keene*, nonetheless fares little better. While that court does not absolve the manufacturer of all liability as the District of Columbia Circuit did, it still declines, on the basis of faulty reasoning, to adopt the manifestation interpretation. In choosing between the traditional manifestation interpretation and the novel exposure interpretation, the court, while paying lip service to the terms of the policies, blindly relies upon the principle that "insurance policies must be strictly construed in favor of the injured and to promote coverage." 633 F.2d at 1221. Unchecked use of this principle, of course, makes a mockery of insurance policies.[26]

---

[25] *Keene* Op., App. A at 34a, 35a.

[26] The Sixth Circuit, as did the District of Columbia Circuit, formalistically relies on alleged ambiguities in the terms of the insurance policies. *See* 633 F.2d at 1222; *Keene* Op., App. A at 12a. Neither court provides anything more than conclusory language in support of this contention. The terms "bodily injury," "sickness," "disease," and "occur" are everyday words that are not at all ambiguous. While the question as to when asbestos-related diseases occur is in dispute it is not because of any ambiguity in those terms. The case law on this point is clear—a disagreement

The terms in these policies make it clear that coverage is provided only for diseases that are sustained or occur during the policy period. The case law overwhelmingly supports the manifestation interpretation of those terms.

While the legal conclusions of the *Forty-Eight* decision cannot be justified, its administrative consequences are, in the words of the *Keene* court which explicitly rejected them, both "unweildy" and costly to "all parties."[27] The approach taken in *Forty-Eight* will not only produce additional litigation, it does not offer even a suggestion as to how the underlying tort suits are to be administered by the multitude of parties that are potentially liable. In contrast, the manifestation interpretation avoids all these unfortunate collateral consequences that flow from *Forty-Eight* and *Keene*.

One final example of the drastic departure from traditional state law by the courts that have rejected the manifestation approach can be seen in their treatment of the issue of who has the burden of proving insurance coverage. Both courts acknowledged that, as the District of Columbia court stated: "the insured generally bears the burden of proving coverage." Op., App. A at 34a n. 42.[28] Having identified the applicable state law on this issue, the courts inexplicably rejected it:

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of this type does not make the relevant provisions ambiguous. *E.g.*, *Antram v. Stuyvesant Life Ins. Co.*, 291 Ala. 716, 287 So. 2d 837, 840 (1973) (dispute as to whether amounts which, but for settlement with tort-feasor, the insured could have received as workmen's compensation are "payable" does not render the word "payable" in the insurance policy ambiguous); *Coombs v. Lumbermen's Mut. Cas. Co.*, 23 Ariz. App. 207, 531 P.2d 1145, 1147 (1975) (the fact that parties disagree over whether an automobile meets the policy definitions of "owned" or "non-owned" does not establish that those terms are ambiguous).

[27] *Keene* Op., App. A at 32a, n.38.

[28] The Sixth Circuit stated: "We recognize that the general rule is that the burden of proof to show coverage is on the insured." 633 F.2d at 1225 n.27.

> "Reversal of the ordinary burden of proof will be more equitable for all parties . . . ." *Keene* Op., App. A at 34a n.42.
>
> "Thus, we simply reverse the ordinary burden of proof and place it on the insurer." *Forty-Eight*, 633 F.2d at 1225 n.27.

This blatant disregard of substantive state law cannot be justified.[29]

In sum, the decisions rendered by the District of Columbia Circuit in *Keene* and the Sixth and Fifth Circuits in *Forty-Eight* and *Porter*, respectively, are supported neither by reason, precedent, nor the general principles of state law that each court claimed it was seeking to apply. Unless corrected, they will result in proliferating litigation and uncertainty that will adversely affect the administration of justice by the federal and state courts as they deal with the mass of asbestos disease litigation. In these circumstances, this Court should exercise its certiorari jurisdiction to assure that the lower federal courts apply both a correct and uniform approach in interpreting these standard comprehensive liability policies of insurance. That approach, if the federal courts respect the principles of *Erie*, is the manifestation approach.

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[29] The courts' ruling in regard to this issue needs review and correction if the obligations of *Erie* are to be enforced in this growing area of federal diversity jurisdiction. The District of Columbia court's characterization of this burden of proof rule as a "traditional procedural rule," (Op., App. A at 34a n.42) is clearly in error. *See Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446 (1959).

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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November 30, 1981

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Supplemental Brief

1

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No. 81-1012

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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On November 30, 1981, Insurance Company of North America ("INA") filed its Petition for Writ of Certiorari requesting review of the Judgment and Opinion of the Court of Appeals for the District of Columbia Circuit in *Keene Corporation v. Insurance Company of North America*. As INA stated in its Petition, the District of Columbia Circuit's Opinion in *Keene* departs so drastically from "traditional state law" that it constitutes a "complete repudiation of *Erie*," substituting therefor the court's own "highly idiosyncratic" "notions of policy and the equities involved." [1]

Now, almost two months after the initial issuance of its Opinion and almost one month after INA's certiorari petition was filed in this Court, the District of Columbia Circuit has issued an order, *sua sponte*, seeking to shore

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[1] INA Petition, at 8, 9, 11, and 17.

up its original Opinion. The court's Order, dated December 21, 1981, is reproduced as an Appendix to this Supplemental Brief. It is truly extraordinary. It renders the *Keene* decision even less defensible than before and reinforces the basic thrust of INA's petition that the *Keene* decision is based on little more than the subjective predilections of its author.

I.

The District of Columbia Circuit's Order sets forth five amendments to the Opinion.[2] One, the addition of a cross-reference to page 14a, note 15, is essentially technical. A second—the addition of a citation that belatedly acknowledges the existence of the decision of the United States District Court for the District of Massachusetts in *Eagle-Picher Industries v. Liberty Mutual Insurance Co.*—merely tends to underscore the court's basic lack of concern for any authority pointing toward a conclusion different from the one it had foreordained.[3] But it is the three substantive amendments to the court's Opinion that underscore the need for review by this Court because they lay bare the inadequacies of the District of Columbia Circuit's approach and demonstrate its departure from the accepted and usual course of judicial proceedings.

First, the unamended Opinion based its interpretation of the insurance policies on what it found to be "the rea-

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[2] The court's original Opinion, dated October 1, 1981, was reproduced as Appendix A to INA's Petition. References herein to the Court of Appeals' original Opinion will be made to the Appendix to INA's certiorari petition. The page numbers are the same as those contained in the Court of Appeals' Order of December 21, 1981, with the exception that the letter "a" is added after each page reference. *I.e.*, a reference to page "13" in the Order will read "13a" in this Supplemental Brief.

[3] The opinion in *Eagle Picher*, which is discussed in detail in INA's certiorari petition, was issued well before the court rendered its decision in *Keene* and was even referred to in Judge Wald's concurring opinion. *See* App. A at 42a, n.3.

sonable expectations of Keene." (Op., App. A at 13a, note 12.) But the district court, the traditional trier of fact, made no such finding[4] and the record contains no support for the Court of Appeals' assertion. What the court now does is to amend its initial statement by deleting the phrase "the reasonable expectations of Keene" and substituting the following:

> the expectations that Keene would have reasonably formed, as an objective matter, on the basis of the policies' language.

In other words, the court has arbitrarily substituted its own "expectations" for those of Keene.[5]

Second, the unamended Opinion held that "exposure-in-residence" to asbestos was a trigger of coverage under the insurance policies. That basis of coverage was not pleaded by Keene in its Complaint, was not the subject of discovery by any of the parties in the litigation, and was, indeed, explicitly excluded from the litigation by the district court when Keene sought to amend its Complaint at the eleventh hour.[6] Needless to say, the district court made no factual findings regarding whether exposure-in-residence results in bodily injury—a necessary prerequisite to any trigger of coverage. The second substantive

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[4] The district court did not discuss or even mention Keene's expectations in respect to the insurance policies. *See* App. B at 50a-58a.

[5] The record shows that *in fact* Keene's expectations were quite different from those that the court ascribes to it as an "objective matter."

[6] At the close of discovery Keene attempted to amend its complaint to add exposure-in-residence as a new basis of liability. *See* Motion for Order Granting Leave to File Second Amended Complaint, April 15, 1980, ¶¶ 12-14, 18-22, 24-25. (Contained in Hartford Accident & Indemnity Co.'s Petition for Writ of Certiorari, No. 81-1197, filed December 24, 1981, App. E at 88a-93a.) The district court rejected Keene's attempt to add this new basis of liability. *See* Order, April 30, 1980. (Hartford App. G at 118a.)

amendment to the Opinion acknowledges that "Keene did not raise the exposure-in-residence aspect of its argument below." But, undaunted, the court goes on to amend its Opinion to state that it makes no difference "Because we do not rely . . . on any legal or factual aspects of Keene's argument. . . ."

When was the last time that a court stated that its opinion did not rest on a single aspect of a party's legal *or* factual argument? And when was the last time that an appellate court felt free to adopt as its own a fact that a party, for good and sufficient reasons, had been precluded from establishing below and to adopt that fact as an abstract principle without support in the record?

Third, the original opinion rejected the applicable state law rule that the "insured bears the burden of proving coverage," (Op., App. A at 34a) with the casual offhanded statement that this "traditional procedural rule . . . cannot be allowed to defeat Keene's . . . rights under the policies." *Ibid.* As INA noted in its Petition, this "blatant disregard of substantive state law" violates the principles of *Erie* and conflicts directly with this Court's holding in *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 446 (1959).[7] The court's original Opinion entirely ignored *Dick*. In its last substantive amendment, the court seeks to paper over that omission by adding the following:

> We recognize that burdens of proof are matters of state law. Dick v. New York Life Ins. Co., 359 U.S. 437 (1959). We believe, however, that this case is so different from the cases in which the insured's burden of proof developed, that those cases provide no authority for this case.

No case support or discussion is offered to support the court's conclusion that this case is "so different" from

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[7] Petition at 18 and note 29.

others as to release the court from the prescriptions of *Dick*. The court's conclusion is mere *ipse dixit*. In fact, the only thing that is "so different" about this case is the unprecedented approach of the District of Columbia Circuit.

II.

In its certiorari petition, INA stated that a uniform and correct federal decision interpreting standard insurance policies was needed, and that this interpretation should be arrived at by applying applicable state law. The District of Columbia Circuit erred by, in fact, applying no state's law, looking instead to its own notions of what those insurance policies should provide. The court's "indispensable initial premise" that "[t]he insurance policies provide Keene with the right to be free of all liability for asbestos-related disease. . ." [8] is indefensible. In pursuing its own notion of what the law should be, the court cavalierly disregarded the facts of the case, the law of the case, and the law of the states.

The court's three substantive amendments dramatically show the lack of any principled approach and the consequent need for this Court's supervision. The Opinion and the court's *sua sponte* amendments adopt positions excluded from the case, lack factual foundation in the record, and intentionally flout applicable state law. Little wonder that the decision is contrary to the large body of applicable state law and is irreconcilable with any other decision in this important area of insurance law. It cries for correction by this Court.

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[8] Op., App. A at 26a; Pet. at 14.

CONCLUSION

For the foregoing reasons and those stated in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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January 11, 1982

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1981

Civil Action No. 78-01011

No. 81-1179

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA, *et al.*
AETNA CASUALTY AND SURETY COMPANY,
Appellant.

And Consolidated Case Nos. 81-1180, 81-1181 & 81-1182

Filed December 21, 1981

Before: BAZELON, Senior Circuit Judge, WILKEY and WALD, Circuit Judges.

ORDER

IT IS ORDERED, by the Court, *sua sponte*, that the Opinion for the Court filed by Senior Circuit Judge Bazelon on October 1, 1981, in the above entitled cases is hereby amended as follows:

Page 13, note 12: At the end of footnote, delete "the reasonable expectations of Keene" and replace with "the expectations that Keene could have reasonably formed, as an objective matter, on the basis of the policies' language."

Page 14, note 15: Add, "*See also* p. 22 n.24."

Page 22, note 24: Add, "One district court, however, has adopted the manifestation theory. *See Eagle-Picher Industries v. Liberty Mut. Ins. Co.*, Civil Action No. 78-2739-Z (D. Mass., August 14, 1981)."

Page 23, note 25: Add at end, new paragraph: "Keene did not raise the exposure-in-residence aspect of its argument below. Because we do not rely, however, on any legal or factual aspect of Keene's argument, *see* note 19 *infra*, we are not precluded from deciding that exposure in residence triggers coverage."

Page 34, note 42: Add after second sentence: "We recognize that burdens of proof are matters of state law. Dick v. New York Life Ins. Co., 359 U.S. 437, 446 (1959). We believe, however, that this case is so different from the cases in which the insured's burden of proof developed, that those cases provide no authority for this case.

PER CURIAM

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Appendix

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No.—

IN THE
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APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1179

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA, ET AL.
AETNA CASUALTY AND SURETY COMPANY,
Appellant

No. 81-1180

KEENE CORPORATION,
Appellant

v.

INSURANCE COMPANY OF NORTH AMERICA, ET AL.

No. 81-1181

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA
LIBERTY MUTUAL INSURANCE COMPANY,
Appellant

No. 81-1182

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA,
AETNA CASUALTY AND SURETY COMPANY, ET AL.
Appellant

Appeals from the United States District Court
for the District of Columbia
D.C. Civil Action No. 78-01011)

Argued June 16, 1981

Decided October 1, 1981

John Mahoney, Jr. for Aetna Casualty and Surety Company, appellant in No. 81-1179 and appellee in Nos. 81-1180, 81-1181 and 81-1182.

Eugene R. Anderson with whom *Harold D. Murry, Jr.* and *Jerold Oshinsky* were on the brief for Keene Corporation, appellant in No. 81-1180 and cross/appellee in Nos. 81-1179, 81-1181 and 81-1182.

Robert N. Sayler with whom *Wynne M. Teel, John E. Heintz, Scott D. Gilbert* and *Frank H. Griffin, III* were on the brief for Armstrong World Inc., et al. amici curiae urging reversal in Nos. 81-1179 thru 81-1182.

John P. Arness with whom *David J. Hensler* and *Elliott M. Mincberg* were on the brief for Hartford Accident and Indemnity Company, appellee in Nos. 81-1179 thru 81-1182.

Michael R. Gallagher with whom *Thomas E. Betz, Alan M. Petrov, Dennis M. Flannery* and *John Payton*

were on the brief for Insurance Company of North America appellee in Nos. 81-1179, 81-1180 and 81-1182 and cross/appellant in No. 81-1181.

Gerald V. Weigle, Jr. with whom *Frank W. Gaines, Jr.*, *Robert L. Hoegele* and *Christopher C. Mansfield* were on the brief for Liberty Mutual Insurance Company, appellee in Nos. 81-1179, 81-1180 and 81-1182 and cross/appellant in No. 81-1181.

Robert O. Tyler entered an appearance for Pennsylvania Manufacturers Association Insurance Company, appellee in Nos. 81-1179, 81-1180, 81-1181 and 81-1182.

Richard A. Epstein and *Leo A. Roth, Jr.* were on the brief for Federal Insurance Company, et al. Amici Curiae urging reversal in Nos. 81-1179, 81-1180, 81-1181 and 81-1182.

Thomas M. Susman was on the brief for Walbrook Insurance Company, LTD., et al. Amici Curiae urging reversal in Nos. 81-1179, 81-1180, 81-1181 and 81-1182.

David Booth Beers and *William R. Galeota* were on the brief for Cassiar Resources Limited, Amicus Curiae urging affirmance in part and reversing in part in Nos. 81-1179, 81-1180, 81-1181 and 81-1182.

Daniel J. Papeo, Paul D. Kamenar and *Nicholas E. Calio* were on the brief for The Washington Legal Foundation, Amicus Curiae urging remand for full consideration in Nos. 81-1179, 81-1181 and 81-1182.

Richard H. Gimer, M. Stuart Madden and *Donald E. Santarelli* were on the brief for Commercial Union Insurance Companies, Amici Curiae urging remand for full consideration in Nos. 81-1179, 81-1180, 11-1181 and 81-1182.

Before: BAZELON, *Senior Circuit Judge*, WILKEY and WALD, *Circuit Judges*

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

Opinion filed by *Circuit Judge* WALD concurring in part.

BAZELON, *Senior Circuit Judge*: This case arises out of the growing volume of litigation centering upon manufacturers' liability for disease caused by asbestos products. In this action, Keene Corporation (Keene) seeks a declaratory judgment of the rights and obligations of the parties under the comprehensive general liability policies that the defendants issued to Keene or its predecessors [1] from 1961 to 1980. Specifically, Keene seeks a determination of the extent to which each policy covers its liability for asbestos-related diseases.[2]

Between the years 1948 and 1972, Keene manufactured thermal insulation products that contained asbestos. As a result, Keene has been named as a codefendant with several other companies in over 6000 lawsuits alleging injury caused by exposure to Keene's asbestos products. Those cases typically involve insulation installers or their survivors alleging personal injury, or wrongful death, as a result of inhaling asbestos fibers over the course of many years. The plaintiffs in the underlying suits al-

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[1] Keene Corporation was formed in 1967 and subsequently purchased most of the stock of Baldwin-Ehret-Hill, Inc. In 1968, Baldwin-Ehret-Hill became a subsidiary of Keene, and in 1970 it was merged into Keene Building Products Corporation, another Keene subsidiary. All corporations sold thermal insulation products that contained asbestos. Keene's brief at 5-6. All corporations will be referred to as "Keene" for simplicity.

[2] Under Borel v. Fibreboard Paper Prods., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), an asbestos manufacturer such as Keene can be held jointly and severally liable for asbestos-related diseases that were caused, in part, by its products.

lege that they contracted asbestosis, mesothelioma, and/or lung cancer as a result of such inhalation.[3]

From 1961 to the present, Insurance Company of North America (INA), Liberty Mutual Insurance Company (Liberty), Aetna Casualty and Surety Company (Aetna), and Hartford Accident and Indemnity Company (Hartford) issued comprehensive general liability (CGL) insurance policies to Keene. From December 31, 1961 through August 23, 1968, INA insured Keene; from

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[3] Asbestosis is a fibrous condition of the lungs, which is caused by asbestos fibers reaching the alveoli. Once begun, the condition progresses without additional inhalation of asbestos, but it becomes even more serious if inhalation continues. The seriousness of the disease in individual cases depends on the duration and intensity of inhalation and on individual idiosyncrosy. *See* Selikoff, Bader, Bader, Churg, and Hammond, *Asbestosis and Neoplasia*, 42 AM. J. MED. 487 (1967); Selikoff, Churg, and Hammond, *The Occurrence of Asbestosis Among Insulation Workers*, 132 ANN. NEW YORK ACAD. SCI. 139 (1965). For a brief discussion of asbestosis, *see* Borel v. Fibreboard Paper Products Corp., *supra* note 2.

Mesothelioma is a malignant tumor of the lining of the lungs or the lining of the peritoneum, which surrounds the organs of the gastrointestinal tract. It is well-established that prolonged inhalation of asbestos fibers causes mesothelioma. The disease can develop many years after inhalation ceases, and can manifest itself several months after it begins to develop.

Lung cancer, or bronchogenic carcinoma, is also generally thought to be caused by prolonged inhalation of asbestos. It too can develop and manifest itself long after inhalation ceases.

The details of the development of these diseases are not relevant to the issues decided below. The only relevant facts are that the diseases develop long after exposure to Keene's products, and that Keene can be held liable for their occurrence.

August 23, 1967 through August 23, 1968, Liberty insured Keene;[4] from August 23, 1968 through August 23, 1971, Aetna insured Keene; from August 23, 1971 through October 1, 1974, Hartford insured Keene; and from October 1, 1974 through October 1, 1980, Liberty insured Keene.[5] The policies that these companies issued to Keene were identical in all relevant respects. The coverage language of the policy that Hartford issued to Keene from 1971 to 1974 is typical. It states that

> [t]he company will pay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as *damages* because of *bodily injury* . . . to which this insurance applies, caused by an *occurrence*, and the company shall have the right and duty to defend any suit against the *insured* seeking *damages* on account of such *bodily injury* . . . even if any of the allegations of the suit are groundless, false or fraudulent . . . .

E.g., J.A. II at 627. "Bodily injury" is defined as "bodily injury, sickness or disease sustained by any person," *id.* at 663; and "occurrence" is defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in *bodily injury* . . .

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[4] From August 8, 1967 through August 23, 1968, both INA and Liberty insured Keene. Liberty argues that its 1967-68 policy does not cover Keene's liability for asbestos-related disease. That issue, which the district court decided against Liberty, is addressed in Part III below.

[5] J.A. at 1028-29. From November 1, 1948 through November 1, 1959, Pennsylvania Manufacturers' Association Insurance Co. insured Keene. Whether its policies covered products liability is in dispute in another case. *See* Keene Corp. v. Pennsylvania Manufacturers' Association Insurance Co., Civ. No. 78-1011 (D.D.C. Jan. 30, 1981), *remanded*, No. 81-1248 (D.C.Cir. Oct. 1, 1981).

neither expected nor intended from the stand point of the *insured. Id.* at 664.[6]

Keene tendered the asbestos-related damages cases to its insurance companies for defense and indemnification. Each company, however, either denied all responsibility for the suits or accepted only partial responsibility. Memorandum op. at 2 (J.A. IX at 3532).

On June 6, 1978, Keene filed this suit for a declaratory judgment and damages in the United States District Court for the District of Columbia. Keene contended that any stage in the progression of an asbestos-related disease triggers coverage of Keene's entire liability under each of the policies. Aetna, INA, and Liberty argued that coverage is triggered only when bodily injury manifests itself during a policy period. Hartford took an intermediate position, arguing that coverage is triggered by the inhalation of asbestos fibers, but that each company's coverage is determined by the ratio of exposure years during its policy period to the entire period of inhalation.

Keene and Hartford filed motions for partial summary judgment based on their respective theories of coverage, and Aetna filed a motion for summary judgment asserting that no case or controversy had been presented. On January 30, 1981, the district court granted Hartford's motion; it granted in part and denied in part Keene's motion; and it denied Aetna's motion. The district court held that indemnification and defense costs should be prorated among the insurance companies according to the relative extent of exposure during their respective

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[6] For a summary of the differences in coverage language amount of the policies, *see* Appendix A (reproduced from J.A. III at 1031-35). All of the policies are reproduced at J.A. I at 17-245, J.A. II at 537-832, J.A. III at 1036-1202, J.A. IV at 1203-1509). We hold that none of the differences in the policies' language warrants different interpretations in this case.

policy periods. The district court also held that Keene is liable for a pro-rata share of the costs when exposure occurred during a period in which Keene was uninsured. J.A. IX at 3537-38.

Pursuant to 28 U.S.C. § 1292(b) (1976), the district court, *sua sponte*, certified its order for interlocutory appeal. INA, Liberty, Aetna, and Keene filed Petitions for Leave To Appeal, and on February 20, 1981, this court granted those petitions and ordered that the appeals be consolidated and expedited. We reverse the district court's order and remand the case to trial on the issues of damages and on the issue of the applicability of Liberty's 1967 policy.[7]

I. JUSTICIABILITY

Aetna argues that Keene's declaratory judgment action does not present a case or controversy. Aetna asserts that Keene must raise insurance coverage issues in the context of a particular case in which an insurance company has refused to defend or indemnify Keene. We disagree.

The standard for finding a justiciable "case or controversy" in a declaratory judgment action is no less demanding than the standard in any other type of action. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). The dispute "must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna*, *supra*, 300 U.S. at 241. This standard was illuminated by Justice Murphy in *Maryland Casualty Co. v. Pacific Co.*, 312 U.S. 270 (1941), where he stated that "the question [of justiciability] in each case is whether the facts alleged,

[7] *See* note 4 *supra*.

under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 273. *See generally* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE (1973) § 2757.

This suit by Keene does not present a hypothetical set of facts. Keene has been, and will continue to be, sued for injuries that result from the use of its asbestos products. For each of these suits—past, present, and future—the rights and obligations of Keene and its insurers must be resolved. There can be no question that the interpretation of the contracts at issue in this case presents a "real and substantial controversy" that can be specifically resolved by a decision in this case.

Aetna implies that the rights and obligations created by the insurance policies cannot be determined without consideration of the facts of a particular tort suit. We have before us, however, the terms of the insurance policies and the facts of the particular types of diseases whose coverage is at issue. We are not aware or informed of any facts that would come to light in a particular tort suit that would be relevant to the determination of the policies' applicability to Keene's liability for asbestos-related injury. We hold, therefore, that the case is justiciable.[8]

II. COVERAGE OF THE INSURANCE POLICIES

The language of each policy at issue in this case clearly provides that an "injury," and not the "occurrence" that causes the injury, must fall within a policy period for it to be covered by the policy. Most suits brought under this type of policy involve an injury and an occurrence that transpired simultaneously, or, at least, in close temporal

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[8] Insurance coverage issues are commonly resolved in declaratory judgment actions. *See* WRIGHT & MILLER, *supra*, at 2760.

proximity to one another. In cases involving asbestos-related disease, however, inhalation—the "occurrence" that causes the injury—takes place substantially before the manifestation of the ultimate injury—asbestosis, mesothelioma, or lung cancer.[9] Furthermore, although it is not known how little exposure is required to cause disease, inhalation may occur over a long period of time. As a result, inhalation may continue through numerous policy periods, the disease may develop during subsequent policy periods, and manifestation may occur in yet another policy period. For an insured such as Keene, different insurers are likely to be on the risk at different points in the development of each plaintiff's disease. Moreover, part of the development may occur at a time when no insurer was on the risk. Asbestos-related diseases, which are certainly covered by the policies, therefore differ from most injuries and hence present a difficult problem of contractual interpretation.

Neither the case law [10] nor the terms of the policies lead

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[9] The district court found that 15 or 20 years can pass following an initial inhalation before asbestosis manifests itself. Longer periods of time can pass before mesothelioma or lung cancer manifest themselves. Keene Corp. v. Insurance Co. of N. America, Civ. No. 78-1011 (D.D.C. Jan. 30, 1981) memorandum op. at 3 (J.A. IX at 3533) [hereinafter cited as memorandum op.]. *Accord*, Selikoff, Churg, & Hammond, *supra* note 3.

[10] Jurisdiction in this case exists under 28 U.S.C. § 1332 (1976) by virtue of the diversity of citizenship between the plaintiffs and each of the defendants. We find it unnecessary, however, to reach the issue of the applicable state law. The district court did not address the issue, nor did any of the parties raise the issue. This omission is apparently due to the fact that the potentially applicable state laws do not differ from one another.

Keene is incorporated in Delaware, has its principal place of business in New York, and is licensed to do business in the District of Columbia. INA is incorporated in Pennsylvania and has its principal place of business in Pennsylvania. Aetna is incorporated in Connecticut and has its principal

us directly to a resolution of the coverage issues raised in this case. Unfortunately, the insurance companies failed to develop policy language that would directly address the full complexity entailed by asbestos-related diseases. We have sought, however, to interpret these contracts in a manner that is equitable and administratively feasible and and that is consistent with insurance principles, insurance law, and the terms of the contracts themselves.

We conclude that each insurer on the risk between the initial exposure and the manifestation of disease is liable to Keene for indemnification and defense costs. If possible, the factual predicate for the allocation of costs among insurers should be based on the facts of the underlying tort suit. If, however, the tort doctrine governing the underlying suit does not require proof of facts that would form a sufficient basis upon which to allocate insurance liability, then the necessary facts may be determined independently of that suit.[11]

In construing the policies' coverage of liability for asbestos-related diseases, our objective must be to give ef-

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place of business in Pennsylvania. Hartford is also incorporated in Connecticut and has its principal place of business in Connecticut. And Liberty is incorporated in Massachusetts and has its principal place of business in Massachusetts. None of the laws of these states gives us specific guidance in resolving this case, and the basic principles governing the interpretation of insurance policies are the same in each state. There is thus no conflict of laws. (There is what some have termed—somewhat confusingly—a "false conflict." *See, e.g.*, R. LEFLAR, AMERICAN CONFLICTS OF LAW 188 (3d ed. 1977); Comment, *False Conflicts*, 55 CALIF. L.REV. 74, 113 (1967).) Therefore, we need not engage in the exercise of identifying which jurisdiction's law governs. *See* Waters v. American Automobile Ins. Co., 363 F.2d 684, 687 (D.C.Cir. 1966); Williams v. Rawlings Truck Line, Inc., 357 F.2d 581, 585 (D.C.Cir. 1965).

[11] *See* TAN pp. 32-35 *infra*.

fect to the policies' dominant purpose of indemnity. COUCH ON INSURANCE 2D, §§ 15:22, 15:41 (2d ed. Anderson 1959); 4 WILLISTON ON CONTRACTS, § 900 (3d ed. Jaeger 1959). An insurance contract represents an exchange of an uncertain loss for a certain loss. In a comprehensive general liability insurance policy, the uncertain loss is the possibility of incurring legal liability, and the certain loss is the premium payment. By issuing the policy, the insurer agrees to assume the risk of the insured's liability in exchange for a fixed sum of money. At the heart of the transaction is the insured's purchase of certainty—a valuable commodity. *See* S. HUEBNER, K. BLACK, JR., R. CLINE, PROPERTY AND LIABILITY INSURANCE (2d ed. 1976) 5-7. This view of the insurance policies provides the starting point for analysis.

The next question must be "certainty with respect to what contingencies?" For an insured is only entitled to indemnity for losses that are covered by its policy. We are aided in our analysis of these policies' coverage by the well-accepted rule that ambiguity in an insurance contract must be construed in favor of the insured. *See, e.g., Blue Anchor Overall Co. v. Pennsylvania Lumbermen's Mut. Ins. Co.*, 385 Pa. 394, 123 A.2d 413 (1956); COUCH ON INSURANCE 2D, § 15:14 (2d ed. Anderson 1959); WILLISTON ON CONTRACTS, § 621 (3d ed. Jaeger 1959). We believe, however, that although particular terms of the policies are ambiguous as applied to asbestos-related diseases, the principles embodied in the insurance policies provide a sufficient basis upon which to decide this case. In discerning those principles, our guide is—as it must be—the reasonable expectations of Keene when it purchased the policies. *See, e.g., Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 869-70, 377 P.2d 284, 288-89, 27 Cal.Rptr. 172, 176-77 (1962); *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 305, 208 A.2d 638, 644 (1965); *Collister v. Nationwide Life Ins. Co.*, 479 Pa.

579, 388 A.2d 1346 (1978); COUCH ON INSURANCE 2D, § 15:16 (2d ed. Anderson 1959).[12]

The analysis of the insurers' duty to indemnify Keene is divided into three logical steps: first, the trigger of coverage under the policies; second, the extent of coverage once a policy is triggered; and third, the allocation of liability among insurers if more than one policy is triggered. That analysis is followed by an examination of the insurers' duty to defend Keene and a discussion of the procedural mechanisms by which asbestos-injury suits can be adjudicated.

A. *Trigger of Coverage*

The first step in the analysis of this problem is to determine what events, from the point of exposure to the point of manifestation, trigger coverage under these policies. In the language of the policies, the question is when did "injury" occur? Both Keene and Hartford advance slightly different versions of the "exposure theory" of coverage. Keene argues that successive coverage is triggered by both exposure to asbestos dust ("inhalation ex-

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[12] Professor (now Judge) Keeton has suggested that the legal doctrines governing the construction of insurance contracts fit together under a more general, frequently unstated, principle that can be summarized as follows:

> The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970). Professor Keeton argues that the principle is appropriate in view of the fact that an insurance policy is a contract of adhesion. *Id.* As applied to this case, we agree with Judge Keeton and explicitly base our interpretation of these policies on the reasonable expectations of Keene.

posure")[13] and the subsequent development of disease ("exposure in residence").[14] Keene bases its argument on medical evidence that the body incurs microscopic injury as asbestos fibers become lodged in the lungs and as the surrounding tissue reacts to the fibers thereafter. Hartford also argues that successive coverage is triggered by continued exposure. Its argument is similarly based on the medical evidence of discrete tissue damage as each asbestos fiber reaches the lungs. For no apparent reason, however, Hartford asserts that the continued progression of disease following exposure does not trigger additional coverage.[15] Basing its decision on *Insurance Co. of N. America v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, Nos. 78-1322-1326 (Mar. 9, 1981), the district court adopted Hartford's version of the exposure theory.[16]

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[13] Keene's brief at 18.

[14] *Id.*

[15] Hartford also argues that the extent of an insurer's liability is limited by the proportion of exposure that occurred in its policy period, whereas Keene argues that, once an insurer's policy is triggered, the insurer is liable for the full loss. *See* pp. 24-29 *infra*.

[16] The Fifth Circuit also followed that case in Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981). In Insurance Co. of N. America v. Forty-Eight Insulations, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, Nos. 78-1322-1326 (Mar. 9, 1981), the issue of allocating indemnification expenses was not before the court. The district court in that case held that both defense and indemnification costs should be apportioned among the insurers and the insured on a pro-rata basis. Insurance Co. of N. America v. Forty-Eight Insulations, 451 F.Supp. 1230 (E.D.Mich. 1978). The insured, however, only appealed the issue of apportioning defense costs to itself. The Sixth Circuit held that the defense costs should be apportioned on the same basis that the district court used to apportion indemnification costs. In *Porter*, it is unclear whether that court held that the insured must bear a pro-rata share of indemnification and defense costs.

For reasons discussed throughout this opinion, however, we decline to adopt the approach taken in those cases.

INA, Liberty, and Aetna advance the "manifestation" theory of coverage. They argue that coverage is triggered only by the manifestation of either asbestosis, mesothelioma or lung cancer. They assert that their interpretation of the contracts is supported by the ordinary meaning of the terms "bodily injury, sickness or disease." They claim that "bodily injury" does not occur until cellular damage advances to the point of becoming a recognizable disease. INA and Liberty rely on cases in other areas of the law—workmen's compensation, health insurance coverage, and statutes of limitation—that support their interpretation of the term "injury." *E.g.*, *Travelers Insurance Co. v. Cordillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955) (workmen's compensation), *cited in* Liberty's brief at 42-44 and INA's brief at 28; *Reiser v. Metropolitan Life Insurance Co.*, 262 App.Div. 171, 28 N.Y.S.2d 283 (1941) *aff'd*, 289 N.Y. 561, 43 N.E.2d 534 (1942) (health insurance), *cited in* Liberty's brief at 45 and INA's brief at 26; *Urie v. Thompson*, 337 U.S. 163 (1949) (statute of limitations), *cited in* INA's brief at 27.

The policy language does not direct us unambiguously to either the "exposure" or "manifestation" interpretation. In the context of asbestos-related disease, the terms "bodily injury," "sickness" and "disease," standing alone, simply lack the precision necessary to identify a point in the development of a disease at which coverage is triggered. The fact that a doctor would characterize cellular damage as a discrete injury does not necessarily imply that the damage is an "injury" for the purpose of construing the policies. At the same time, the fact that an ordinary person would characterize a fully developed disease as an "injury" does not necessarily imply that the manifestation of the disease is the point of "injury" for purposes of construing the policies. In interpreting a contract, a term's ordinary definition should be given weight, but the definition is only useful when viewed in the context of the contract as a whole.

Moreover, the legal definition of "injury" in other contexts informs the term's definition in this case only if the term operates in a functionally similar manner in the other contexts. In the areas of workmen's compensation, health insurance, and statutes of limitations, the concept of "injury" performs a function that is different from its function in the context of comprehensive general liability policies.[17] Therefore, the term's definition in those con-

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[17] Workmen's compensation cases are only minimally instructive in construing comprehensive general liability policies. Those cases, only some of which adopt the manifestation approach, rely largely on the legislative intent behind workmen's compensation statutes. *See* General Dynamics Corp. v. Benefits Review Board, 565 F.2d 208, 212 (2d Cir. 1977); Travelers Insurance Co. v. Cardillo, 225 F.2d 137, 145 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). The cases that adopt the manifestation approach are based on "the overriding importance of efficient administration" in the workmen's compensation system. *Cardillo, supra*, 225 F.2d at 145. Although administrative feasibility must be one of our concerns in this case, it is not so "overriding" that we would be willing to accept the consequences that it would imply for the contracts before us.

Statute of limitations cases are not at all relevant. The date that a disease is deemed to occur for purposes of statutes of limitations is generally the date of manifestation. *E.g.*, United States v. Kubrick, 444 U.S. 111 (1979). If the date of a disease's origin were to begin statute of limitations periods, meritorious claims would be barred. As a matter of policy, courts have held that the purpose of the statutes of limitations—to protect defendants against stale claims—does not warrant barring such claims. *See, e.g., id.* at 117; Urie v. Thompson, 337 U.S. 163, 169-71 (1949). The considerations involved in those cases have no bearing on the considerations relevant to this case.

The health insurance cases are more relevant to this case. The only problem in those cases, however, is to determine when a disease begins in order to decide whether it began during a policy period. The cases hold that if a disease manifests itself during a policy period, then that policy covers the disease even if the origin of the disease can be traced

texts is only minimally relevant to the question at hand. Instead, the purpose of the insurance policies must inform our construction of the term "injury".

If exposure to asbestos were deemed to constitute a discrete injury and thereby trigger coverage, as Hartford and Keene suggest, the subsequent development of a disease would be characterized best as a consequense of the injury. Future stages of development would not constitute new injuries [18] and therefore would not trigger additional coverage.[19] Under that interpretation, a manufacturer who bought a comprehensive general liability policy would not bear the risk of liability for diseases that occurred

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back to a point in time prior to the policy period. *See, e.g.*, Wilkins v. Grays Harbor Community Hospital, 71 Wash.2d 178, 427 P.2d 716 (1967); Reiser v. Metropolitan Life Insurance Co., 262 App.Div. 171, 28 N.Y.S.2d 283 (1941) *aff'd*, 289 N.Y. 551, 43 N.E.2d 534 (1942). In those cases, the security that the policies provided would be undermined if a disease were *not* covered by the insurer on the risk at the time the disease manifests itself.

The court in *Forty-Eight*, *supra* note 16, expressed a similar opinion concerning the relevance of cases in these areas of the law. 633 F.2d at 1220-22.

[18] This seems to be Hartford's theory. Hartford does not suggest that exposure in residence should trigger coverage.

[19] This would not be true of Keene's characterization of asbestos-related diseases as a series of discrete injuries beginning with inhalation exposure and continuing throughout the development of the disease. That characterization would imply the same conclusion that we reach, although perhaps not when Keene is held jointly and severally liable with other manufacturers. *See* note 20 *infra*. Such a characterization is, however, unnecessarily fact-bound. If a disease could be predicted to develop many years after inhalation of asbestos, yet no cellular changes were known to occur during that period, we would still hold that all policies are triggered from the point of exposure through the point of manifestation. In addition, by beginning with that characterization of the disease, Keene fails to develop the proper rationale for the result it seeks.

due to exposure during a covered period. It would, however, bear the risk of liability for diseases that manifest themselves during the covered period, but that occur because of exposure at a time when the manufacturer held no insurance. As a result, the manufacturer's purchase of insurance would *not* constitute a purchase of certainty with respect to liability for asbestos-related diseases. The insured would remain uncertain as to future liability for injuries whose development began prior to the purchase of insurance. There is no indication that such a de facto exclusion of coverage from the policies was in the contemplation of any party to the contracts in this case. At the least, such an exclusion is inconsistent with Keene's reasonable expectations when it purchased the policies. The policies state that the insured is covered for "injury" during the policy period. In purchasing such coverage, Keene could have reasonably expected that it was covered for all future liability, except liability for injuries of which Keene could have been aware prior to its purchase of insurance. A latent injury, unknown and unknowable to Keene at the time it purchased insurance, must, at least, be covered by an insurer on the risk at the time it manifests itself. Any other result would violate very reasonable expectations of Keene. Therefore we hold that manifestation of disease is one trigger of coverage under the policies.[20]

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[20] The characterization of each exposure as a discrete injury must be rejected for yet another reason. In Borel v. Fibreboard Paper Prods., *supra* note 2., the court held that an asbestos-product manufacturer can be held jointly and severally liable for asbestos-related disease as long as its products had some causal relationship to the development of the disease. That means that a person who used Keene's products for one year, for instance, and then used other manufacturers' asbestos-containing products for several years, could recover damages from Keene for his total loss. If each exposure is considered a separate "injury," under the terms of the policies, one might be able to argue that each insurer

In *American Motorists Ins. Co. v. Squibb*, 95 Misc.2d 222, 406 N.Y.S.2d 658 (1978), the court faced an issue similar to the one in this case, under an insurance policy that was similar in all relevant respects to the policies we have before us. That case involved a drug manufacturer's liability for cancer that was caused by the ingestion of DES by the victims' mothers during pregnancy many years earlier. Squibb argued that the insurance company on the risk at the time of the disease's manifestation was obligated to pay the damages. The insurance company responded by arguing that the injury occurred when the victims' mothers ingested the drug and not when the disease manifested itself. The court held that "bodily injury" occurred when the cancer mani-

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is responsible only for the "injuries" that occurred during its policy periods, even though Keene, in effect, would be liable for "injuries" that occurred outside those policy periods, as a result of exposure to other manufacturers' products. It is unclear whether that is the holding in *Forty-Eight*, *supra* note 16, 633 F.2d at 1225, or whether that is Hartford's argument. It is clear, however, that such a result would be contrary to the terms of the insurance policies, which explicitly state that the insurer will pay "all sums which the insured shall become legally obligated to pay as damages because of bodily injury [during the policy period]." As long as there was either inhalation exposure or exposure in residence during a policy period, and as long as Keene must pay damages as a result, the insurer must indemnify Keene for whatever damages it must pay. That must be true even if Keene is obligated to pay for injury that may have occurred, in part, as a result of exposure to other manufacturers' products. To that extent, the terms of the policies incorporate evolving tort doctrines. The allocation of liability among Keene's insurers is addressed in section II-C, below.

Thus, rather than engaging in further heuristic constructs to avoid this inappropriate result, we have approached this problem in a straightforward manner that avoids the problem from the outset. We treat the diseases at issue in this case as single injuries that occur over extended periods of time.

fested itself. The court stated that "the policy language does not limit coverage to incidents of exposure during the policy period, but rather to conditions which result in bodily injury during the policy period." *Id.* at 659. That court did not have to determine the liability of an insurer that was on the risk prior to the diseases' manifestation.

Thus, if the purpose of the policies is not to be undercut, the manifestation of disease must constitute an "injury". Any characterization of exposure as a *discrete* injury, therefore, must be rejected. This is the same result that courts have reached in determining when an injury or disease begins for purposes of health and accident insurance policies. In those cases, courts have held that a manifestation rule is necessary to protect the reasonable expectations of the insured. *E.g., Silverstein v. Metropolitan Life Ins. Co.*, 254 N.Y. 81, 171 N.E. 914 (1930); *Cohen v. North American Life & Casualty Co.*, 150 Minn. 507, 185 N.W. 939 (1921). In health and accident insurance policies, as in liability insurance policies, the purpose of the contracts would be defeated if the insured had to bear the risk of disease that is latent at the time a policy is purchased. *See* Comment, *Liability Insurance for Insidious Disease: Who Picks Up the Tab?* 48 FORDHAM L. REV. 657, 671 (1980) (this rule is necessary to provide security policyholder seeks).

None of this implies, however, that insurance policies may not also be triggered prior to manifestation. In fact, we conclude that coverage is also triggered by both inhalation exposure and exposure in residence.

To demonstrate why the policies require that both exposure and manifestation trigger coverage, we begin by positing a rule in which manifestation is the *sole* trigger of coverage. If that interpretation were adopted, as INA, Liberty, and Aetna propose, Keene would not be

covered for diseases manifesting themselves after 1976.[21] By that time, it was widely known that prolonged inhalation of asbestos has a high probability of causing disease.[22] From about then on, insurance companies ceased issuing policies that adequately cover asbestos-releated disease. Yet we can still expect thousands of cases of those diseases to manifest themselves throughout the rest of the century. If we were to hold that only the manifestation of disease can trigger coverage, the insurance companies would have to bear only a fraction of Keene's total liability for asbestos-related diseases.

The possibility of that result would undermine the function of the insurance policies. When Keene purchased the policies, it could have reasonably expected that it was free of the risk of becoming liable for injuries of which it could not have been aware prior to its purchase of insurance.[23] There is no doubt that these losses would be covered if the diseases at issue developed spontaneously upon inhalation. Inhalation of asbestos is an "occurrence" that causes injury for which Keene may be held liable. The possibility that the insurers may not be liable arises solely because there is a period of time between the point at which the injurious process began and the point at which injury manifests itself. In this

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[21] Beginning in 1976, Liberty began using large deductibles and administrative fees for handling asbestos-damage claims. Memorandum op. p.2 n.2, p.6 (J.A. IX at 3532, 3536).

[22] Although asbestosis has been known to man since the early 1900s, *see* note 25 *infra*, the general danger of prolonged exposure to asbestos fibers was not fully recognized until the late 1960s or early 1970s. *See* Insurance Co. of N. America v. Forty-Eight Insulations, *supra* note 16, at 1215. Keene stopped using asbestos in its products at about that time. Memorandum op. p. 1 (J.A. IX at 3531).

[23] *See* p. 18 *supra*.

case, during that interim period, the existence of latent injury among people who had worked with asbestos became predictable with a substantial degree of certainty. The injury and attendant liability became predictable precisely because it was discovered that past occurrences were likely to have set in motion injurious processes for which Keene could be held liable. To accept the argument that *only* manifestation triggers coverage—and allow insurers to terminate coverage prior to the manifestation of many cases of disease—would deprive Keene of the protection it purchased when it entered into the insurance contracts. We, therefore, reject the manifestation theory as presented by INA, Aetna, and Liberty,[24] because it does not allow exposure, as well as manifestation to trigger insurance coverage.

Thus, in order for Keene's rights under the policies to be secure, both inhalation exposure and exposure in residence must also trigger coverage. Regardless of whether exposure to asbestos causes an immediate and discrete injury, the fact that it is part of an injurious process is enough for it to constitute "injury" under the policies.

This conclusion is consistent with the law involving insurance coverage of losses that begin during a period of coverage but continue to develop after a policy's expiration. For example, *Snapp v. State Farm Fire & Cas. Co.*, 206 Cal.App.2d 827, 24 Cal. Rptr. 44 (1962) involved a fire insurance policy that included coverage of most types of physical damage to property. The policy was issued on the plaintiff's house, which had been damaged due to movement of the land under the house. While the land was still unstable, the policy expired, and the insurer sought to limit its liability to the amount of dam-

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[24] The other circuits that have considered this manifestation theory in the context of asbestos-related disease have also rejected the theory. *See* Porter v. American Optical Corp., *supra* note 16; Insurance Co. of No. America v. Forty-Eight Insulations, Inc., *supra* note 16.

age that had occurred prior to the policy's termination date. The court held that the insurer's liability was not so limited, and that it had to indemnify the policyholder for all damage caused until the land movement ceased. The court stated that "[t]o permit the insurer to terminate its liability while the fortuitous peril which materialized during the term of the policy was still active would not be in accord either with applicable precedents or with the common understanding of the nature and purpose of insurance." *See also Harman v. American Cas. Co.*, 155 F. Supp. 612 (S.D. Cal. 1957) (insurer cannot terminate property loss or fire protection while land remains unstable).

These cases illustrate the principle that when it becomes known that an occurrence has set in motion a process that has a significant probability of resulting in a covered loss, the insurer on the risk at that time is liable for the full loss. It does not matter whether the insurer learns of a progressing loss through direct observation, as in *Snapp*, or through statistical inference, as in asbestos-injury cases. It is the use of that knowledge to shift a covered risk back to the insured that is not permitted.[25]

In sum, the allocation of rights and obligations established by the insurance policies, would be undermined if either the exposure to asbestos or the manifestation of asbestos-related disease were the *sole* trigger of coverage. We conclude, therefore, that inhalation exposure, exposure in residence, and manifestation all trigger coverage under the policies. We interpret "bodily injury" to mean any part of the single injurious process that asbestos-related diseases entail. We now proceed to consider the

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[25] Theoretically, it would be possible to preserve Keene's rights under the policies if coverage were triggered at the point at which the dangers of asbestos inhalation were discovered. Such an interpretation, however, is not compelled by the terms of the policies and would be impossible to implement.

extent to which an insurer is liable to its policyholder once coverage under its policy is triggered.

B. *The Extent of Coverage*

The policies at issue in this case provide that the insurance company will pay on behalf of Keene "all sums" that Keene becomes legally obligated to pay as damages because of bodily injury during the policy period. We have defined "bodily injury" to mean any part of the injurious process that begins with an initial exposure and ends with manifestation of disease. As a result, when Keene is held liable for an asbestos-related disease, only part of the disease will have developed during any single policy period. The rest of the development may have occurred during another policy period or during a period in which Keene had no insurance. The issue that arises is whether an insurer is liable in full, or in part, for Keene's liability once coverage is triggered. We conclude that the insurer is liable in full, subject to the "other insurance" provisions discussed in section C below.

Hartford argues that each insurer is required to pay only a pro-rata share of Keene's liability. Once an insurer's coverage is triggered, its share would be determined by the duration of a plaintiff's exposure to Keene's products during its policy periods in relation to the entire duration of the plaintiff's exposure to Keene's products. Under Hartford's scheme, if there is a period of exposure during which Keene is uninsured, then Keene would bear a pro-rata share of the liability. [26]

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[26] Apparently, the formula Hartford would propose is the following:

$$\text{Insurance company X's pro-rata share} = \frac{\text{number of years of exposure to Keene's products during company X's policy period}}{\text{Total number of years of exposure to Keene's products}} \times \text{Keene's total liability}$$

But see note 20 *supra*. Hartford argues that only inhalation exposure should be taken into account in prorating liability.

Hartford's argument is based on its characterization of asbestos-related diseases as consisting of a multitude of discrete injuries to the lung tissue. We have declined, however, to rely on that factual characterization in determining the trigger of insurance coverage,[27] and we decline to rely on it in determining the extent of coverage. Instead, we continue to rely on the terms of the contracts and the principles they embody.

Our starting point is the interpretation of the policies as the insurers' promises of certainty to Keene. The policies that were issued to Keene relieved Keene of the risk of liability for latent injury of which Keene could not be aware when it purchased insurance. Keene did not expect, nor should it have expected, that its security was undermined by the existence of prior periods in which it was uninsured, and in which no known or knowable injury occurred.[28] If, however, an insurer were obligated to pay only a pro-rata share of Keene's liability, as the district court held, those reasonable expectations would be

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[27] *See* pp. 17-18 & n.20 *supra*.

[28] *See* p. 18 and 23 *supra*.

The possibility of injury as a result of prolonged exposure to a substance was not unknown at the time these policies were issued. Cases of asbestosis were reported among asbestos textile workers early in the twentieth century, and by the 1930s it was well recognized that prolonged exposure to asbestos causes the disease. *See* Borel v. Fibreboard Paper Products Corp., *supra* note 2. *See generally* Selikoff, Churg, and Hammond, *supra* note 3 (discussion of asbestosis). Moreover, most of the policies explicitly recognize continuous exposure to certain conditions as an occurrence that can result in injury. They provide that such exposure within a single policy period is considered a single occurrence for purposes of the limit of liability provisions. Yet none of the policies provided that the insurer's liability would be limited in any way when exposure extends over several policy periods. The absence of such a provision supports our view that Keene could have reasonably expected *complete* security from each policy it purchased.

violated. Keene's security would be contingent on the existence and validity of all the other applicable policies. Each policy, therefore, would fail to serve its function of relieving Keene of all risk of liability. The logical consequence of this is that the policies must require that once an insurer's coverage is triggered, the insurer is liable to Keene to the full extent of Keene's liability up to its policy's limits, but subject to "other insurance" clauses, discussed in section C, below.

Judge Wald suggests that the rationale of our decision is consistent with prorating insurance obligations to Keene for the years in which it was not insured. Judge Wald believes such a pro-rata allocation is fair, and we do not think her view is unreasonable. As we have just shown, however, such an allocation is inconsistent with the terms and underlying principles of the insurance policies at issue in this case.

We read Judge Wald's reasoning as follows: 1) As the court interprets the term, an asbestos-related "injury" occurs over a long period of time; 2) if Keene was uninsured during part of that time, then Keene is not covered for the full injury; 3) therefore, Keene should pay a pro-rata share of its own liability.

If we read Judge Wald correctly, her position is problematic. Although we have defined the term "injury," we have done so only as an incidental aspect of a logically prior determination of Keene's rights under the policies viewed in their entirety. The insurance policies provide Keene with the right to be free of all liability for asbestos-related disease, unless such a disease was known or knowable by Keene at the time it purchased an insurance policy.[29] For that right to be preserved, each policy

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[29] *See* pp. 18, 21 *supra*.

As Judge Wald points out, concurring op. at p. 3 n.7, this interpretation of the policies provides the basis of our entire decision. She is correct in pointing out that it is an "indispensable initial premise of the liability theory [that we

that Keene purchased between an initial exposure and the ultimate manifestation of a disease must be triggered. In a sense, that means that "injury" occurred during each of the policy periods. It does not mean, however, that there was some "injury" that did *not* occur during a policy period. That conclusion and the implication that the insurers are not obligated to indemnify Keene in full contradicts the first and foremost aspect of our decision—our holding that each policy provides Keene with the right to be free of liability for asbestos-related disease.

As stated above, each policy has a built-in trigger of coverage. Once triggered, each policy covers Keene's liability. There is *nothing* in the policies that provides for a reduction of the insurer's liability if an injury occurs only in part during a policy period. As we interpret the policies, they cover Keene's entire liability once they are triggered. That interpretation is based on the terms of the policies themselves. We have no authority upon which to pretend that Keene also has a "self-insurance" policy that is triggered for periods in which no other policy was purchased. Even if we had the authority, what would we pretend that the policy provides? What would its limits be? There are no self-insurance policies, and we respectfully submit that the contracts before us do not support judicial creation of such additional insurance policies.

Hartford argues that this allocation of liability allows Keene to "enjoy the benefits of insurance coverage which

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espouse]." *Id.* We rest our interpretation on the terms and principles of the insurance policies in issue. *See* pp. 18, 21 *supra*. Judge Wald's reliance on fairness in support of an alternative—but unstated—basic premise is appealing. *Id.* However, the contracts at issue in this case do not warrant such an independent appeal to fairness as a basis for deciding to allocate liability among all of the parties. At the same time, we see nothing unfair in holding that Keene is fully covered by each of the policies that it purchased.

it has never paid for." Hartford's brief at 31.[30] The contrary point, however, is more accurate: For an insurer to be only partially liable for an injury that occurred, in part, during its policy period would *deprive* Keene of insurance coverage for which it paid. With each policy, Keene paid for insurance against all liability for bodily injury. The policies do not distinguish between injury that is caused by occurrences that continue to transpire over a long period of time and more common types of injury.[31] Nor do the policies provide that "injury" must occur *entirely* during the policy period for full indemnity to be provided.

In support of its argument for pro-rata apportionment of liability, Hartford asserts that the liability scheme we now adopt would leave an insured equally off with one year of insurance coverage as it would be with several years of coverage. *Id.* That assertion is inapposite for two reasons. First, as a matter of probability, the more years of coverage that an insured has purchased, the smaller will be the number of injuries for which it will be liable. An insured will not be covered for an injury if it has insurance neither when a plaintiff's disease was developing nor when the disease manifested itself.[32] Second, and perhaps more important, because we hold below that only one policy's limits of liability may apply to one injury,[33] an insured who has purchased several policies

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[30] The Sixth Circuit made the same point in Insurance Co. of N. America v. Forty-Eight Insulations, *supra* note 16, at 1225.

[31] This omission is particularly significant in the policies that explicitly recognize the possibility that injury can be caused by prolonged exposure to certain conditions. *See* note 28 *supra*.

[32] We recognize, however, that there is not a linear relationship between the number of years of coverage and the number of injuries that can be expected to be covered.

[33] *See* p. 29 *infra*.

that cover an injury will only be able to collect under one of those policies, even though he paid for several. Therefore, it is the insurer—not the insured—who reaps the most benefit from the similarity of treatment between an insured with one year of coverage and an insured with several years of coverage.[34]

Not surprisingly, the policies do not explicitly provide a means of applying the limits of liability to injuries that are covered by multiple policies. Keene claims that it is entitled to full indemnity for each injury up to the sum of the limits provided by the applicable policies. We do not agree. The principle of indemnity implicit in the policies requires that successive policies cover single asbestos-related injuries. That principle, however, does not require that Keene be entitled to "stack" applicable policies' limits of liability. To the extent possible, we have tried to construe the policies in such a way that the insurers' contractual obligations for asbestos-related diseases are the same as their obligations for other injuries. Keene is entitled to nothing more. Therefore, we hold that only one policy's limits can apply to each injury. Keene may select the policy under which it is to be indemnified. *Cf. Forty-Eight, supra*, 633 F.2d at 1226 n.28.

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[34] We are further supported in our conclusion by the fact that Keene could be held fully liable for an asbestos-related injury even if a plaintiff's exposure to Keene's products was minimal compared to his or her exposure to other manufacturer's products. *See Borel, supra* note 2. If Keene were held fully liable under such circumstances, there would be no question but that whatever insurer was on the risk at that time could be held fully liable to Keene. Given that, it does not require too great a leap of logic to hold fully liable any insurer whose policy covers a particular injury. We need not confront the issue of an insurer's obligation if an injury for which the insured can be held liable is not indivisible as the diseases at issue in this case are.

C. *Allocation of Liability*

In any suit against Keene for an asbestos-related disease, it is likely that the coverage of more than one insurer will be triggered. Because each insurer is fully liable, and because Keene cannot collect more than it owes in damages, the issue of dividing insurance obligations arises. The only logical resolution of this issue is for Keene to be able to collect from any insurer whose coverage is triggered, the full amount of indemnity that it is due, subject only to the provisions in the policies that govern the allocation of liability when more than one policy covers an injury. That is the only way that Keene can be assured the security that it purchased with each policy. Our holding each insurer fully liable to Keene is also consistent with other courts' allocation of liability when more than one insurer covers an indivisible loss. *E.g., Groul Construction Co. v. Insurance Company of North America*, 11 Wash.App. 632, 524 P.2d 427 (1974) (continuous damage to property insurance policy).

This does not mean that a single insurer will be saddled with full liability for any injury. When more than one policy applies to a loss, the "other insurance" provisions of each policy provide a scheme by which the insurers' liability is to be apportioned. For instance, INA's policy states:

> When both this insurance and other insurance apply to the loss on the same basis, whether primary, excessive or contingent, INA shall not be liable under this policy for a greater proportion of the loss than stated in the applicable contribution provision below.

J.A. II at 551. The contribution provision referred to contains formulae for "contribution by equal shares" and for "contribution by limits," depending upon the pro-

visions of other applicable policies.[35] These provisions of the policies must govern the allocation of liability among the insurers in any particular case of asbestos-related disease. However, the primary duty of the insurers whose coverage is triggered by exposure or manifestation is to ensure that Keene is indemnified in full.[36]

D. *Costs of Defending Suits Against Keene*

The policies provide that the insurer shall defend any suit against Keene for damages due to bodily injury, even if the suit is groundless, false or fraudulent. The insurers' duty to defend Keene and to pay Keene for its defense costs are more broad than their duty to indemnify Keene. As long as a complaint indicates that Keene may be liable for an injury, an insurer must defend

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[35] *E.g.*,

> (a) Contribution by Equal Shares. If all of such other valid and collectible insurance provides for contribution by equal shares, INA shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each insurer has paid its limit in full or the full amount of the loss is paid.
>
> (b) Contribution by Limits. If any of such other insurance does not provide for contribution by equal shares, INA shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

J.A. II at 551.

In addition, nothing we hold today bars insurers from collecting from one another under the doctrine of contribution.

[36] The procedure by which this duty can be enforced is discussed in section E, below.

Keene if the facts alleged in the complaint indicate that its policy covers the alleged injury. Because we hold that each insurer is fully liable to Keene for indemnification, it follows that each is fully liable for defense costs.[37]

Of course, only the insurer that Keene selects will defend Keene. The duty of that insurer is simply to defend Keene, not to minimize its own liability. As we state below, the factual basis of the insurers' contract obligations may be developed independently of the factual basis of the tort suit. If it is possible to resolve both the tort dispute and the insurance contract dispute together, without disrupting the tort victim's suit and without imposing undue inconvenience on the victim, a trial court may do so. Otherwise the two disputes should be resolved separately. This should eliminate the possibility that the insurer that represents Keene at trial will attempt to skew the factual record to the disadvantages of other insurers.[38]

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[37] Nothing we now hold should be read to prevent an insurer from sharing the costs of defense with other insurers under the "other insurance" clauses or under the doctrine of contribution.

[38] The construction that we adopt today should lead to far less complex tort suits than the district court's construction would have provoked. If each insurer and Keene had to bear pro-rata shares of total damage awards, all of them would have to join the other defendants (and their insurers) in each tort suit. Each suit would thus become an unwieldy spectacle. Within the plaintiff's suit for damages, groups of defendants would pursue disputes with each other. That result, which is not required by the contracts, would impose unnecessarily high costs on all parties—particularly the victim, who should not have to bear any of the cost of a dispute among Keene's insurers or between Keene and its insurers. We expect that these suits will be litigated more efficiently under the liability scheme we set forth today.

It should also be noted that we are not requiring that the company that defends Keene must also be the company whose policy limits determine the extent to which Keene may be indemnified. *See* p. 29 *supra*.

E. *Resolution of Factual Issues*

In a typical suit for products liability, the same set of facts would prove both the manufacturer's tort liability and the insurer's contractual liability. That is not true of suits that arise out of an asbestos-related disease. The leading case concerning manufacturers' liability for asbestos damage claims is *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied* 419 U.S. 896 (1974). The court in *Borel* held that each manufacturer who contributed in any way, and at any time, to a claimant's bodily injury is fully liable for all of the resulting damages. If a victim was exposed to the products of more than one manufacturer, each manufacturer is jointly and severally liable to the victim. *See also Karjala v. Johns Manville Products Corp.*, 523 F.2d 155 (8th Cir. 1975). As a result, a plaintiff in a suit against Keene need not prove the full extent of his or her exposure to asbestos. Yet that set of facts is essential to determining which policies cover Keene's liability.

The doctrine of joint and several tort liability in this context is an accepted means of vindicating the rights of the tort victims. Nothing that we decide concerning the contractual liability of the insurers to Keene should impair the tort plaintiff's prosecution of his or her suit.[39]

Thus initially, the full insurance obligation to Keene must be divided among the insurers whose policies are triggered based on the facts brought out in the tort suit against Keene. The possibility of additional coverage can be determined consensually among insurers, or it can

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[39] This would also be true of other underlying tort doctrines such as enterprise liability, *e.g.*, Hall v. E.I. du Pont de Nemours, 345 F.Supp. 353 (E.D.N.Y. 1972), or market share liability, *e.g.*, Sindell v. Abbot Laboratories, 26 Cal.3d 588, 607 P.2d 924, 163 Cal.Rptr. 132, *cert. denied*, 449 U.S. 912 (1980). *See generally*, Comment, 57 N.D.L. Rev. 81 (1981).

be adjudicated among insurers in a subsequent law suit. At that point the insurance obligations can be reallocated among all the insurers whose policies are found to cover a particular injury.[40] Any facts concerning the period of exposure or the point of manifestation that are proved in an underlying tort suit need not be legally dispositive of a dispute among insurers concerning allocation of their liability. Perhaps if the underlying tort suit would not be disputed and the plaintiff would not be put to undue inconvenience, the factual record needed to allocate insurance responsibility may be developed during the course of the underlying tort suit.[41]

If a victim sues more than one asbestos-product manufacturer, it may be impossible to prove which company's products were used at which time. If so, it will be impossible to prove that exposure to Keene's products—as opposed to those of another manufacturer—occurred during a particular time period. In such a case, there should be a presumption that throughout the victim's period of exposure to asbestos he or she was exposed to Keene's and the other manufacturers' products. The insurer defending Keene in the underlying tort suits may then try to show that Keene's products could not have been involved for certain years.[42] Similarly, if a suit arises to

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[40] *See* Comment, *Liability Insurance for Insidious Disease: Who Picks Up the Tab?*, 48 FORDHAM L.REV. 657, 691-92 (1980).

[41] Preferably this would be done by affidavit or deposition.

[42] We recognize that the insured generally bears the burden of proving coverage. The injuries at issue in these cases, however, are unique and traditional procedural rules cannot be allowed to defeat Keene's or its insurers' substantive rights under the policies. Reversal of the ordinary burden of proof will be more equitable for all parties and will prevent unnecessary litigation. The Sixth Circuit, in Insurance Co. of N. America v. Forty-Eight Insulation, *supra* note 16, also set out this procedure for litigating multiple-defendant suits for asbestos-related disease.

resolve the allocation of insurance liability, any insurance company can try to prove that there was no inhalation of Keene's asbestos during or before its policy period. If an insurance company does so, then that company will be free of liability.

III. Liberty's 1967-68 Policy

The district court included Liberty's 1967-68 policy among the policies that potentially cover Keene's liability for asbestos-related injury.[43] Liberty argues that the policy does not cover Keene's liability for injuries caused by the products of its former subsidiary Baldwin-Ehret-Hill. In opposition to Keene's motion for summary judgment, Liberty submitted affidavits to support its position. Liberty also argues that if the policies did cover Baldwin-Ehret-Hill, that facet of their coverage was conveyed to Gale Corporation when Keene sold Baldwin-Ehret-Hill to Gale.[44] Keene responds by arguing that Endorsement No. 1 of the policy provides for coverage of any subsidiary in which Keene owned more than a fifty-percent interest.[45] In February 1968, Keene acquired more than fifty percent of Baldwin-Ehret-Hill's stock. Therefore, Keene argues, Baldwin-Ehret-Hill was covered by Liberty's policy.

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[43] Memorandum op. at 3 (J.A. IX at 3532).

[44] Liberty's brief at 63-65.

[45] Keene's reply brief at 27-28. Endorsement No. 1 reads as follows:

> [t]he term named insured includes in addition to the person or corporation named in Item 1 of the declarations any business entity . . . while the person or organization named in Item 1 of the declarations . . . owns, during the policy period, an interest in such entity of more than fifty-percent (50%).

J.A. III at 1047.

We hold that there was before the district court a genuine issue of material fact on this point. Therefore, the district court erred in including the issue in its summary judgment order.

CONCLUSION

In view of the above, we reverse the district court's order of summary judgment. The district court should enter a judgment and institute further proceedings consistent with this opinion.

So ordered.

Appendix A: Variations in Policy Language *

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period/ Territory
INA	12/31/61-12/31/64 **	To pay on behalf of the insured . . . damages because of bodily injury . . . arising out of . . . all . . . operations [other than automobile] of the insured	[T]he company shall . . . defend any suit against the insured alleging such injury . . . even if such suit is groundless, false or fraudulent	The words "bodily injury" . . . mean bodily injury, sickness, disease	This policy applies only to occurrences or accidents which take place during the policy period
	1/1/65-1/1/68	Same	Same	Same	Same
	1/1/68-8/23/68	INA will pay on behalf of the Insured . . . damages because of personal injury . . . to which this insurance applies, caused by an occurrence	INA shall have the right and duty to defend any suit against the Insured seeking damages on account of such personal injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	[P]ersonal injury means . . . bodily injury, disability "[B]odily injury" means bodily injury, sickness or disease sustained by any person (Definition of "occurrence" applies only to property damage)	This insurance applies only to personal injury . . . which occurs during the policy period

* Source: J.A. III at 1081-85.

** All policy provisions are taken from the 1/1/65-1/1/68 policy.

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period/ Territory
Liberty Mutual	8/23/67-8/23/68*	The company will pay on behalf of the insured . . . damages because of . . . bodily injury . . . to which this policy applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"[B]odily injury" means bodily injury, sickness or disease . . . which occurs during the policy period "[O]ccurrence" means an accident including continuous or repeated exposure to conditions which results in bodily injury	Not relevant
Aetna	8/23/65-8/23/71	The company will pay on behalf of the insured . . . damages because of bodily injury . . . to which this insurance applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"[B]odily injury" means bodily injury, sickness or disease "[O]ccurrence" means an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury	This insurance applies only to bodily injury . . . which occurs during the policy period

* All policy provisions are taken from the 10/1/74-10/1/75 policy.

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period/ Territory
Hartford	8/23/71-8/23/72	The company will pay on behalf of the insured . . . damages because of . . . bodily injury . . . to which this insurance applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"[B]odily injury" means bodily injury, sickness or disease "[O]ccurrence" means an event including injurious exposure to conditions which result, during the policy period in bodily injury	This insurance applies only to bodily injury . . . which occurs during the policy period
	8/23/72-8/23/73	Same	Same	Same	Same
	8/23/73-10/1/74	Same	Same	"[B]odily injury" means bodily injury, sickness or disease . . . which occurs during the policy period "[O]ccurrence" means an event including injurious exposure to conditions which result, during the policy period in bodily injury	Same

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period/ Territory
Liberty Mutual	10/1/74-10/1/75	The company will pay on behalf of the insured . . . damages because of . . . bodily injury . . . to which this policy applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"[B]odily injury" means bodily injury, sickness, or disease . . . which occurs during the policy period "[O]ccurrence" means an accident, including continuous or repeated exposure to conditions which results in bodily injury	Not relevant
	10/1/75-10/1/76	Same	Same	Same	Same
	10/1/76-10/1/77	The company will pay on behalf of the insured . . . damages because of . . . personal injury* . . . to which this policy applies, caused by an occurrence	[T]he company shall have the right and duty to defend any suit against the insured seeking damages on account of such personal injury . . . even if any of the allegations of the suit are groundless, false or fraudulent	"Personal injury" means . . . bodily injury "[B]odily injury" means bodily injury, sickness or disease . . . which occurs during the policy period "[O]ccurrence" [as amended] means . . . exposure to conditions which results in "bodily injury" . . . neither expected nor intended from standpoint of the "insured"	Not relevant

* The term "personal injury" was substituted, by endorsement, for bodily injury

Insurer	Policy Period	Indemnification Provision	Defense Provision	Definitions	Policy Period/ Territory
Liberty Mutual	10/1/77-10/1/78	Same	Same	Same	Same
	10/1/78-10/1/79	Same	Same	Same	Same
	10/1/80	Same	Same	Same	Same

Wald, *Circuit Judge*, concurring in part:

This is a case of first impression and, irrespective of how it is resolved, requires a "leap of logic," maj. op. n. 34, from existing precedent, for it concerns diseases about which there is no medical certainty as to precisely how or when they "occur." We do know the prerequisite—exposure to asbestos fibers—and the symptoms that manifest themselves, generally too late for effective treatment. What happens in between is still something of a mystery; why does one exposed person fall victim to the diseases while another does not? This suit is one of several filed in different courts to ascertain the liability of insurers of manufacturing companies when those companies are sued by asbestosis, mesothelioma and lung cancer victims who have been exposed to the companies' products. Two circuits, the Fifth [1] and Sixth,[2] have determined that exposure alone should trigger the insurer's liability.[3] The Sixth Circuit has also determined that the judgment awarded to the victim should be allocated among insurance companies pro rata according to their share of the total risk period during which the manufacturer was insured. If the risk period includes years when the manufacturer was uninsured (or self-insured), the manufacturer must bear a proportional share of the judgment.[4]

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[1] Porter v. American Optical Corp., No. 78-1953 (5th Cir. April 8, 1981 [hereinafter *Porter*].

[2] Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, Nos. 78-1322-1236 (Mar. 9, 1981).

[3] The United States District Court for the District of Massachusetts, however, determined that manifestation triggered coverage. Eagle Picher Industries, Inc. v. Liberty Mutual Insurance Company, et al., Civil Action No. 78-2739-2 (D. Mass. August 14, 1981).

[4] The Fifth Circuit was not forced to resolve the question of whether the insured ought to be included within the pro rata distribution of liability. *Porter*, 641 F.2d at 1145.

The approach taken in the panel opinion here is different from the approaches of other courts in two significant respects. First, it defines the "injury" that triggers insurance coverage not merely as exposure to asbestos fibers or manifestation of the symptoms of asbestosis, mesothelioma or lung cancer, but also—at least in the case of asbestosis—as the process by which the victim's body resists, adapts, and tries to accommodate itself to a foreign matter—a process, which we understand from the medical testimony elicited at trial, is a major, if not primary, factor in the development of asbestosis. In short, the "injury" is taking place every year that the asbestos fiber remains *in situs* until tissue damage in the lungs is significant enough to be detected by X-rays or to produce symptomatic effects of asbestosis, mesothelioma or lung cancer. *See* maj. op. at n.3. I *agree* with this more comprehensive definition of "injury," encompassing the period from initial exposure to manifestation, because it comports with what we know and do not know about the etiology and progress of the diseases. This process-oriented definition not only provides a flexible formula for adjudicating the legal issues associated with asbestos-related diseases, but also sets a useful precedent for other product-exposure injuries, as of yet unknown in origin. Further, the more comprehensive definition will give much needed certainty to the insurance industry, currently rent asunder by advocates of exposure and manifestation, whose fluctuating positions often depend upon their economic interests in a particular case, and by differing judicial rulings which seem to depend at least partially upon the equities of each case.

Second, the majority opinion exempts asbestos manufacturers from all financial responsibility arising from a suit if the manufacturer had purchased insurance

which covered any part of the injury period.[5] I am not able to agree with this aspect of the majority opinion, as it applies to the period *prior* to the time when such coverage could no longer be obtained.[6] I just do not understand why an asbestos manufacturer, which has consciously decided not to insure itself during particular years of the exposure-manifestation period, should have a reasonable expectation that it would be exempt from any liability for injuries that were occurring during the uninsured period. It seems to me logical and fair[7]—as it seemed to the Sixth Circuit and to the trial court here—to distribute the ultimate financial responsibility on a pro rata basis among the various insurance companies on line during the risk period, and to include

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[5] However, if liability exceeds the liability limit of the policy, then the majority would hold the manufacturer liable for the amount exceeding the limit.

[6] I agree, however, that the manufacturer may target one insurance company to defend the suit and that if judgment is awarded for the victim, the targeted insurance company must pay the victim to the extent of coverage and then seek contribution from other on-line insurers. I disagree only to the extent that self-insurers are excluded from contributing.

[7] The majority finds my position "problematic," but that is only because I have not made as long a "leap of logic" as it. Thus, I do not think that "Keene's rights [to be free of all liability] under the policies viewed in their entirety," are so much the product of a "logically prior determination," maj. op. at 26, as they are the indispensable initial premises of the liability theory espoused in the opinion. Since I can find no first premises in the terms of the policies and canons of interpreting insurance policies, I must seek my own first premises in notions of fairness rather than in principles of logic. I cannot agree that it is fair to exempt self-insurers under these circumstances. I recognize the problems of working out the terms of a "self-insurance policy," but we should expect difficulties when we forge new ground. Certainly the majority's position entails its own share of implementation problems.

Keene as a self-insurer for the years when it failed to take out any insurance. This position, advocated by the Hartford Accident and Indemnity Company, is not, as the panel opinion says, maj. op. at 25, based upon a conceptualization of asbestos-related diseases as a multitude of discreet injuries to the victim. Rather, it is based upon the very notion of "injury" adopted by the panel. If asbestos-related diseases are understood as progressive or cumulative, then all those who voluntarily assumed risk during the period when the diseases progressed must share the responsibility for the judgment and this includes self-insurers. If the risk is to be shared only by the insurance companies, a manufacturing company that purchased insurance intermittently during the risk period would be as secure as those prudent companies that continually purchased insurance.

Subject to this concern, I concur with the majority opinion.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Civil Action No. 78-01011

No. 81-1179

KEENE CORPORATION
v.
INSURANCE COMPANY OF NORTH AMERICA, *et al.*
AETNA CASUALTY and SURETY COMPANY,
Appellant

And Consolidated Case Nos.
81-1180, 81-1181 and 81-1182

ARGUED 6-16-81

Before: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

The suggestions for rehearing *en banc* of Liberty Mutual Insurance Company, Hartford and Indemnity Company and Aetna Casualty Company have been circulated to the full Court. A majority of the Court has not yet voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestions are denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

BY: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge MacKinnon would grant the suggestions for rehearing *en banc.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1981

Civil Action No. 78-01011

No. 81-1179

KEENE CORPORATION

v.

INSURANCE COMPANY OF NORTH AMERICA, *et al.*
AETNA CASUALTY and SURETY COMPANY,
Appellant

And consolidated case Nos.
81-1180, 81-1181, 81-1182

ARGUED 6-16-81

Before: Bazelon, Senior Circuit Judge, Wilkey and Wald, Circuit Judges

ORDER

On consideration of the petitions for rehearing filed by Commercial Union Insurance Companies, Keene Corporation, Liberty Mutual Insurance Company, Aetna Casualty Company, Hartford Accident and Indemnity Company and Insurance Company of North America, it is

ORDERED by the Court that the aforesaid petitions are denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 78-1011

KEENE CORPORATION,
Plaintiff,

v.

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,
Defendants.

Jan. 30, 1981

Harold D. Murry, Jr., Clifford & Warnke, Eugene R. Anderson, Jerold Oshinsky, Anderson, Baker, Kill & Olick, Washington, D.C., for plaintiff.

John P. Arness, David J. Hensler, Hogan & Hartson, Washington, D.C., for defendant Hartford Accident & Indemnity Co.

Dennis M. Flannery, John Payton, Wilmer & Pickering, Washington, D.C., Michael R. Gallagher, Thomas E. Betz, Gallagher, Sharp, Fulton, Norman & Mollison, Cleveland, Ohio, for defendant Ins. Co. of North America.

John F. Mahoney, Jr., Roger W. Heald, Pledger & Mahoney, Washington, D.C., for defendant Aetna Casualty and Surety Co.

Frank W. Gaines, Robert L. Hoegle, Olwine, Connelly, Chase, O'Donnell & Weyher, Washington, D.C., Gerald V. Weigle, Jr., D. Gary Reed, Dinsmore, Shohl, Coates & Deupree, Cincinnati, Ohio, for defendant Liberty Mutual Ins. Co.

Earl T. Britt, Wayne A. Schaible, Duane, Morris & Heckscher, Philadelphia, Pa., Robert O. Tyler, Williams, Myers & Quiggle, Washington, D.C., for defendant Pennsylvania Manufacturers' Association Ins. Co.

MEMORANDUM OPINION

JUNE L. GREEN, District Judge.

Plaintiff, Keene Corporation (Keene), is a New York corporation licensed to do business in D.C. The defendants, Insurance Company of North America, Aetna Casualty and Surety Company, Hartford Accident & Indemnity Co., Liberty Mutual Insurance Company and Pennsylvania Manufacturers Association, (PMA)[1] are all insurance companies which wrote policies of insurance for general liability for Keene or its subsidiary-predecessors. Plaintiff seeks a declaratory judgment under the policies of the respective defendants.

From time to time, Keene or Keene Building Products Corporation (KBPC), a wholly owned subsidiary, acquired all of the right, title and interest in the following manufacturers of insulation containing asbestos: Ehret Magnesia Manufacturing Co. (Ehret), Baldwin-Hill (B-H) and Baldwin-Ehret-Hill (BEH).

In 1976, Keene closed out all of its thermal insulation products containing asbestos and has neither made nor sold them since that time.

Recently, more than 5,000 cases have been filed against Keene or its predecessors, alleging personal injury or wrongful death as a result of the use of its products which contained asbestos insulating material. The injuries claimed are asbestosis, mesothelioma and bronchogenic carcinoma.

Keene has called upon the defendant insurance companies to defend the suits and indemnify Keene under the general liability policies whether the action is against

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[1] Neither Keene, its predecessor companies, nor PMA has located any policies of insurance, only index cards of policy numbers. The Court has dismissed PMA in a separate opinion filed this date.

Keene, Ehret, B-H, BEH or KBPC. The defendants have failed to do so at considerable cost to Keene for defense and/or settlement of claims.

The insurance companies provided coverage as follows: INA insured BEH from December 31, 1961 through August 23, 1968; Hartford insured Keene and predecessors from August 23, 1971 through October 1, 1974; Liberty insured Keene from August 23, 1967 through August 23, 1968, and again from October 1, 1974 through September 30, 1980, and Aetna insured Keene from August 23, 1968 through October 1, 1971.[2] All of these policies contained products coverage.

Plaintiff has filed a motion for partial summary judgment, leaving for later, the question of damages.

Aetna has alleged that this Court has no jurisdiction to consider the matter. It claims that no case or controversy exists because the 5,000 plus cases have not been impleaded.

A declaratory judgment is an appropriate means for resolving controversies relating to the extent of coverage under a policy of insurance. *Ins. Co. of No. Am. v. Forty-Eight Insulations*, 451 F.Supp. 1230 (1978), *aff'd* 633 F.2d 1212 (6th Cir., 1980); *Friestad v. Travelers Ind. Co.*, 452 Pa. 417, 306 A.2d 295 (1973); *Crown Cork & Seal, Inc. v. Aetna Casualty & Surety Co., et al.*, Pa.Ct. of Common Pleas (Oct. 9, 1980). Moreover, the determination of the respective rights and duties of the various companies is a proper subject for summary judgment.

This Court makes no determination as to the liability or other pertinent matter on the individuals' suits against Keene and its former affiliates. Nothing contained herein shall prevent the insurance company or companies in-

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[2]. Pursuant to the policies in effect on and after October 1, 1976, Liberty has agreed to defend and indemnify Keene on a deductible basis in which Keene bears most of the cost.

volved from raising all pertinent defenses. However, it is a case of controversy when a company which has bought coverage cannot get representation in lawsuits filed against it or indemnification because of arguments between the insurance companies themselves and the insured. The result is that the insured is without the representation it has paid for. Accordingly, Aetna's motion for summary judgment, which the Court more properly treats as a motion to dismiss, is denied.

Liberty, INA and Aetna maintain that *manifestation* of the bodily injury during the policy period triggers the coverage. Keene and Hartford, on the other hand, maintain that *exposure* to asbestos is the controlling policy period for a person who develops one of the asbestos caused ailments. The insurance policies provide coverage for bodily injury caused by an occurrence during the policy period. The Court must therefore decide when the bodily injury occurs in asbestos caused ailments.

This court has heard testimony from two medical experts on asbestos related diseases, both of whom agree that the diseases asbestosis, mesothelioma and bronchogenic carcinoma have origins in concentrated inhalation of asbestos fibers, and that these diseases are cumulative and progressive. The physical symptoms caused by these three diseases do not manifest themselves to an injured individual until years after the initial inhalation of asbestos. With asbestosis, sometimes 15 or 20 years will pass before an individual develops shortness of breath and a cough. The waiting period is even longer with those who develop bronchogenic carcinoma due to asbestos inhalation. However, it is clear that bodily injury has occurred long before these symptoms develop.

The Court will first address the etiology of asbestosis as the overwhelming majority of underlying suits allege injuries due to asbestosis. Dr. Kleinerman attempted to equate the occurrence of the injury or disease in asbestosis with the advanced development of fibrosis, which he

said generally occurs years after exposure.[3] However, he also stated that "any amount of fibrosis constituted injury" which indicates that the initial bodily insult occurs much earlier.

Dr. Gaensler indicated that tissue injury in an individual who develops asbestosis begins "virtually the moment that asbestos fibers [reach] the alveoli", and that a tissue injury could be ascertained by biopsy within 24 to 48 hours after the concentrated inhalation of asbestos. Further, he testified that scarring and the deposition of collagen could occur within weeks of inhalation. As a practical matter, this bodily injury could only be ascertained in its early stages where the patient had died in an accident and an autopsy was performed.

The Court finds that the original bodily injury and insult to the lungs in asbestosis cases occurs at or near the first heavy inhalation of the fibers and continues progressively. Bodily injury is injury to the tissue, not just diagnosable disease. It does not matter that this bodily injury is not diagnosable because of the limitations of medical equipment at the time of the original insult.

While this matter has been pending before this Court, a similar question has been before Chief Judge Feikens of the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit which affirmed his decision. *INA v. Forty-Eight Insulations, supra.*

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[3] Asbestos fibers irritate the extremely delicate lung tissue when inhaled. They land in the alveoli where it is suspected they cause mechanical damage due to their stiffness. Additionally, in an effort to cleanse the lung, macrophages attempt to engulf the fibers. The fibers are too long frequently to be engulfed and the macrophages die, releasing proteolytic enzymes which further damage the lung. The end result of this tissue injury and reaction to the asbestos fibers is the formation of collagen and scar tissue, which is termed fibrosis.

We adopt the reasoning of Circuit Judge Keith who wrote for the majority:

> . . . the proponents of the manifestation theory urge that we treat asbestosis the same as any other disease and that we not make any "special rules" for the cumulative disease situation which asbestosis presents.
>
> We cannot agree. Cumulative disease cases *are* different from the ordinary accident or disease situation. First, the underlying theory of tort liability is that the asbestos manufacturers continually failed to warn the asbestos workers and that, as a result of this, continuous breathing of asbestos particles allowed asbestosis to progress to the point where it caused death or injury. The insurance policies before us are comprehensive general liability policies which are designed to insure the manufacturer against products liability suits. The contracting parties expect coverage to parallel the theory of liability. Otherwise . . . the manufacturer's coverage becomes illusory since the manufacturer will likely be unable to secure any insurance coverage in later years when the disease manifests itself.
>
> Second, a question might exist as to whether the microscopic tissue injury which occurs upon initial inhalation of asbestos should be defined as the occurrence of a "disease" or "bodily injury". However, there is universal medical agreement that the time when asbestosis manifests itself is not the time when the disease occurred. No doctor would say that asbestosis occurred when it was discovered.

Id., 633 F.2d at 1219.

The cases relied upon by the proponents of manifestation are inapposite because they are primarily statute of limitations cases, workers' compensation cases and health insurance cases. *See, Tijsseling v. Gen. Acc. Fire*

& Life Assurance Corp., Ltd., 55 Cal.App.3d 623, 127 Cal.Rptr. 681; *Met. Life Ins. Co. v. Reynolds*, 48 Ariz. 205, 60 P.2d 1070 (1936); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2nd Cir. 1955) *cert. denied*, 350 U.S. 913, 76 S.Ct. 196, 100 L.Ed. 800 (1955) ("Last employer" or "last exposure" rule). These distinctions have been dealt with in detail by Judge Keith, *INA v. Forty-Eight Insulations, supra*, 633 F.2d at 1220-1222.

Further support for the exposure theory comes from *Tenneco Chemicals v. Employers Mutual Liability Ins. Co.*, 76 Civ. 809 (S.D.N.Y.) (April 8, 1977). In *Tenneco*, plaintiff was injected with a radioactive drug for testing purposes. The drug broke down improperly and plaintiff suffered from radiation exposure for a long period of time. The insurance company covered the drug company starting two years after the injection and the policy expired eleven years before diagnosis. The court held against the insurance company, holding that occurrence coverage was possibly the broadest coverage and that the injury had occurred during the period of insurance coverage. Chief Judge Feikens relied upon this case as does this Court. *INA v. Forty-Eight Insulations, supra*, 451 F.Supp. at 1242.

It should be noted particularly that if the manifestation theory were adopted, manufacturing companies would be unable to buy full products insurance protection. No insurer would undertake to protect completely a company which had exposed uncounted workers to a hazard for a period of years. This refusal would be likely in the instant case because of the probability of thousands of asbestos related injuries or diseases manifesting themselves at some future time.

The unreality of the manifestation theory becomes even clearer when it is realized that in such a situation those companies which were paid premiums to cover the risk at the time of manufacture and exposure would be free and clear from fiscal responsibility. In this connection, it

should be pointed out that the partial insurance available to Keene at the present time calls for large deductible sums at exorbitant premiums.

The Michigan Court limited its opinion to asbestosis, but this Court finds that the exposure to and heavy inhalation of asbestos triggers the insurance coverage for the diseases mesothelioma and bronchogenic carcinoma as well. The link between asbestos and mesothelioma is well-established. Mesothelioma is a cancer of the mesothelial cells which line the chest walls and surround the organs of the chest cavity. It generally occurs 20 years or more after there has been excessive inhalation of asbestos fibers in those individuals who develop it. While it is easily discovered and diagnosed shortly after it develops, there is no satisfactory treatment of the disease and the victim almost always dies within several years of the tumor's initial development. Dr. Gaensler testified that the initial injury leading to the disease occurs when an asbestos fiber travels down the lung's airways, reaches an alveolus on the edge of the lung, perforates the lung, and, with breathing, irritates the tissue. This process can occur within several days, but it may take as long as one to two months.

Bronchogenic carcinoma, a group of tumors that arise from different parts of the lung, is also linked with asbestos inhalation, though it has other known causes. Dr. Gaensler stated that significant asbestos exposure increases a smoker's chances of developing bronchogenic carcinoma five to tenfold.[4] He further testified that the irritation caused by the asbestos fibers, which is a factor in the eventually diagnosed bronchogenic carcinoma, begins immediately on inhalation of asbestos.

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[4] Dr. Gaensler explained that the correlation between asbestos inhalation and bronchogenic carcinoma in non-smokers is not known because of its rare occurrence which makes carrying forth statistically significant studies extremely difficult.

An obligation to defend Keene exists on the part of each insurance company which carried products liability coverage during the period of time in which the claimant alleges he/she was exposed to Keene's or its subsidiary predecessors' asbestos products. Keene asserts that it should not be required to contribute to its defense even if the exposure claimed fell at a time when Keene was uninsured. Keene argues that if it were covered at any time, it should be afforded representation. The Court cannot agree with that argument and finds that Keene stands in the same position as the insurance companies. If the years in question were covered by insurance, then obviously Keene should be both represented and indemnified, but if not, it should pay its pro rata share of both. *INA v. Forty-Eight Insulations, supra*, 633 F.2d at 1224-1225.

For the foregoing reasons, the Court holds that:

Insurance coverage is triggered when an injured claimant is exposed to asbestos products. Each insurance company on the risk during the times of claimant's exposure shall bear its pro rata share of the cost of representation and indemnification for each such claim. The limit of liability for each company shall be based on its maximum limit per occurrence for each such policy. The terms "insurance company". or "each company" shall be equally applicable to Keene if self-insured or uninsured during any of the time in question.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action 78-2739-Z

EAGLE-PICHER INDUSTRIES, INC.

vs.

LIBERTY MUTUAL INSURANCE COMPANY,
AMERICAN MOTORISTS INSURANCE COMPANY,
WALBROOK INSURANCE COMPANY, LTD.,
WINTERTHUR SWISS INSURANCE COMPANY,
SOUTHERN AMERICAN INSURANCE COMPANY,
MUTUAL REINSURANCE COMPANY, LTD.,
ST. KATHERINE INSURANCE COMPANY, LTD.,
LONDON & EDINBURGH GENERAL INSURANCE COMPANY, LTD.,
BERMUDA FIRE & MARINE INSURANCE COMPANY, LTD.,
DOMINION INSURANCE COMPANY, LTD.,
YASUDA FIRE AND MARINE INSURANCE COMPANY (U.K.), LTD.,
BELLEFONTE INSURANCE COMPANY,
TUREGUM INSURANCE COMPANY, LTD.,
MENTOR INSURANCE COMPANY, (U.K.), LTD.,
ASSICURAZIONI GENERALI LONDON,
STRONGHOLD INSURANCE COMPANY, LTD.,
EXCESS INSURANCE COMPANY,
LONDON & EDINBURGH INSURANCE COMPANY,
NATIONAL CAUSALTY COMPANY OF AMERICA, LTD.,
ACCIDENT & CASUALTY INSURANCE COMPANY,
ARGONAUT NORTHWEST INSURANCE COMPANY,
SLATER, WALKER INSURANCE COMPANY, LTD.,
JOHN BASIL THOMAS BIRD,
a representative underwriter, and
PHILIP ALAN FROUDE,
a representative underwriter.

JUDGMENT

ZOBEL, D.J.

In accordance with the Memorandum of Decision dated August 14, 1981,

It is declared that the operative data for determining which of the several policies in suit apply to a given claim or lawsuit in which damages are sought from plaintiff, Eagle-Picher Industries, Inc. is the date of actual diagnosis of the asbestos-related disease or, with respect to those cases in which no diagnosis was made prior to death, the date of death.

/s/ Ray W. Zobel
District Judge

August 14, 1981
Date

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action 78-2739-Z

EAGLE-PICHER INDUSTRIES, INC.

vs.

LIBERTY MUTUAL INSURANCE COMPANY,
AMERICAN MOTORISTS INSURANCE COMPANY,
WALBROOK INSURANCE COMPANY, LTD.,
WINTERTHUR SWISS INSURANCE COMPANY,
SOUTHERN AMERICAN INSURANCE COMPANY,
MUTUAL REINSURANCE COMPANY, LTD.,
ST. KATHERINE INSURANCE COMPANY, LTD.,
LONDON & EDINBURGH GENERAL INSURANCE COMPANY, LTD.,
BERMUDA FIRE & MARINE INSURANCE COMPANY, LTD.,
DOMINION INSURANCE COMPANY, LTD.,
YASUDA FIRE AND MARINE INSURANCE COMPANY (U.K.), LTD.,
BELLEFONTE INSURANCE COMPANY,
TUREGUM INSURANCE COMPANY, LTD.,
MENTOR INSURANCE COMPANY, (U.K.), LTD.,
ASSICURAZIONI GENERALI LONDON,
STRONGHOLD INSURANCE COMPANY, LTD.,
EXCESS INSURANCE COMPANY,
LONDON & EDINBURGH INSURANCE COMPANY,
NATIONAL CAUSALTY COMPANY OF AMERICA, LTD.,
ACCIDENT & CASUALTY INSURANCE COMPANY,
ARGONAUT NORTHWEST INSURANCE COMPANY,
SLATER, WALKER INSURANCE COMPANY, LTD.,
JOHN BASIL THOMAS BIRD,
a representative underwriter, and
PHILIP ALAN FROUDE,
a representative underwriter.

MEMORANDUM OF DECISION

ZOBEL, D.J.

This is a declaratory judgment action in which Eagle-Picher Industries, Inc. ("Eagle-Picher") requests a declaration of the rights, liabilities and obligations of the parties to certain insurance contracts. The defendants are insurance companies which had provided Eagle-Picher with primary comprehensive general liability insurance and with first and second layer excess insurance during the years 1968-1979. The questions of interpretation arise because Eagle-Picher has been named as a defendant in approximately 5,500 lawsuits in which the plaintiffs allege that they contracted certain asbestos-related diseases as a result of contact with asbestos-containing products manufactured by Eagle-Picher between 1931 and 1971. The basic question the Court must determine is whether insurance coverage is triggered as of the time or times the claimant was exposed to the asbestos-containing product ("Exposure Theory"), or whether such coverage is triggered when the asbestos-related disease first manifests itself by discoverable and diagnosable signs or symptoms, typically as much as twenty years after the initial exposure ("Manifestation Theory"). Whichever insurance company was "on the risk" at what is determined to be the triggering time or times must provide coverage, including payment of damages and provision of legal defense. The Court's interpretation of the policies will determine which insurance company or companies, if any, must defend against and pay any damages for the increasingly numerous underlying claims against Eagle-Picher. Plaintiff, Liberty Mutual Insurance Company and certain companies and underwriters in the London Market, known in these proceedings as the Bird Defendants,[1] espouse the manifestation theory. American Motor-

[1] Walbrook Insurance Company, Ltd., Winterthur Swiss Insurance Company, Southern American Insurance Company,

ists Insurance Company ("American Motorists") and certain other named members of the London Market, the so-called Froude Defendants,[2] maintain that only policies in effect at the time of exposure provide coverage.

This opinion constitutes both Findings of Fact and Conclusions of Law.

Prior to 1968 Eagle-Picher was uninsured for the underlying asbestosis and related claims. From January 1968 through 1978 Liberty Mutual provided primary insurance with varying limits. From June 1973 to 1979 plaintiff was covered in addition by, first one and later two layers of excess insurance.

The coverage provided by each excess layer goes into effect only if the policy limits of the layer beneath become exhausted. This three-layer coverage was achieved through the issuance of many short-term policies, by each insurer, typicaliy covering one year at a time. Appendix A provides a graphic representation of the coverages in effect during the relevant period.

In 1977 Liberty Mutual sent to Eagle-Picher a warning notice that the policy limits for 1974 and 1975 might be

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Mutual Reinsurance Company, Ltd., St. Katherine Insurance Company, Ltd., London & Edinburgh General Insurance Company, Ltd., Bermuda Fire and Marine Insurance Company (U.K.), Ltd., Dominion Insurance Company, Ltd., Yasuda Fire and Marine Insurance Company (U.K.), Ltd., Bellefonte Insurance Company, Mentor Insurance Company, (U.K.), Ltd., Assicurazioni Generali London, Stronghold Insurance Company, Ltd., London & Edinburgh Insurance Company, National Casualty Company of America, Ltd., Accident & Casualty Insurance Company, Argonaut Northwest Insurance Company, Slater, Walker Insurance Company, Ltd. and John Basil Thomas Bird, a representative underwriter.

[2] Turegum Insurance Company, Ltd., Excess Insurance Company, and Philip Alan Froude, a representative underwriter.

exhausted. Eagle-Picher forwarded this notice to American Motorists and the London Market. American Motorists acknowledged receipt of the notice but indicated disagreement with Liberty Mutual's assignment of claims to policy periods and its handling of claims under the manifestation theory. By letter dated October 13, 1977 a New York law firm acting for the entire London Market sent a reservation of rights letter to Eagle-Picher concerning the underlying claims. The reservation of rights is based on the issue whether liability is to be determined under the manifestation or exposure theory. A genuine controversy exists between the parties with regard to the defendants' duties and obligations under their respective policies in connection with the underlying asbestos related claims.

All defendants with interests adverse to those of Eagle-Picher are citizens of states or countries other than Ohio, the state of incorporation of Eagle-Picher and the state where its principal place of business is located.

The insurance policies at issue all contain "coverage" clauses defining in general terms the scope of the coverage. In addition, the policies provide definitions of relevant terms. All are "occurrence-based", that is, coverage is provided for personal injury caused by an "occurrence" during the policy period. The policies, while quite similar, contain minor variations in language and punctuation which do not, however, affect the determination of the question presented so as to produce different results for different insurers. Before analyzing the policies, it is useful to lay out the relevant language.

1. Between January 1, 1968 and January 1, 1978, Liberty Mutual provided the plaintiff with primary comprehensive general liability insurance. The fourteen separate policies contain no more than two variations of each relevant clause. With respect to coverage, one variation, found primarily in policies written during the early years, provides:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury . . . to which this policy applies, caused by an occurrence . . .

The second variation, found in policies covering January 1, 1976 to January 1, 1978, provides:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury due to asbestos exposure caused by an occurrence if the bodily injury is included within the products hazard . . .

The policies include two slightly different definitions of relevant terms. The first provides:

> *Bodily injury* means bodily injury, sickness or disease sustained by any person.
>
> *Occurrence* means an accident, including continuous and repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

The second provides:

> *Bodily injury* means bodily injury, sickness or disease sustained by any person, which occurs during the policy period, including death at any time resulting therefrom.
>
> *Occurrence* means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected or intended from the standpoint of the insured.

2. From June 1, 1973 to October 1975 American Motorists provided the plaintiff with a first layer excess umbrella policy, containing the following coverage clause:

> The Company agrees to indemnify the insured for all sums which the insured shall become obligated to pay as damages, by reason of liability . . . because of personal injury . . . caused by or arising out of an occurrence which takes place during the policy period anywhere in the world.

The policy also contains the following definitions:

> *Personal injury* means (a) bodily injury, shock, sickness or disease (including death, mental anguish, and mental injury resulting therefrom); . . .
>
> *Occurrence* means an accident, or a continuous or repeated exposure to conditions which results, during the policy period, in personal injury, . . . property damage or advertising liability neither expected nor intended from the standpoint of the insured. . . .

3. From October 10, 1975 through January 1, 1979 the so-called London Market provided plaintiff with first layer excess umbrella insurance, replacing American Motorist. The "London Market" is a group of insurance underwriters, each of whom underwrites a stated percentage of the total coverage provided by a single policy. The "coverage clause" of the London Market policy provides:

> Underwriters hereby agree . . . to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability . . . imposed upon the Assured by law . . . for damages on account of: Personal Injuries . . . caused by or arising out of each occurrence happening anywhere in the world. . . .

The policy also contains the following definitions:

> The term *personal injuries* wherever used herein means bodily injury (including death at any time resulting therefrom,) mental injury, mental anguish, shock, sickness, disease, disability. . . .

> The term *occurrence* wherever used herein shall mean an accident or happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises shall be deemed one occurrence.

4. The London Market also provided plaintiff with second layer excess umbrella coverage from September 1, 1973 to January 1, 1979. These second layer policies contain no independent coverage clauses or definitions; instead, they incorporate by reference the terms of the underlying policy. Each policy contains a clause providing for payment of damages "caused by or arising out of each occurrence . . . arising out of the hazards covered by and defined in the underlying umbrella policies . . . ." Thus, between September 1, 1973 and October 10, 1975, the London Market second layer policies provided coverage in accordance with the terms of the underlying American Motorists first layer policy; from October 10, 1975 to January 1, 1979 the London Market second layer policies provided coverage as defined by the London Market's own first layer policies.

All parties to this dispute agree that the relevant policy language is clear and unambiguous. They disagree as to the meaning of the unambiguous language and the Court received certain medical evidence in aid of interpretation.

The coverage clauses, except that in the American Motorists policies, provide indemnity for all sums for which the insured shall become legally obligated to pay [liability imposed by law] for "damages because [by reason or on account] of . . . bodily [personal] injury . . . caused by [or arising out of] an occurrence . . ." American Motorists differ in that they agree to indemnify with respect to "an occurrence during the policy period."

The terms used in the policy are terms of art. Both "personal" or "bodily injury" and "occurrence" are defined in each policy. Each term of art is linked to the next by the use of causal connectors such as "by reason of" "because of" and "caused by or arising out of." Liability is "caused" by injury, and injury in turn is "caused" by an occurrence. This construction implies that liability, injury, and occurrence, while necessarily connected, are nevertheless distinguishable. It means further that each element is expected to occur separately in time.

All policies except the later group of those written by Liberty Mutual define occurrence as "an accident or a continuous or repeated exposure to conditions which results, during the policy period, in personal injury . . ." This definition is broad and inclusive. Each "occurrence" is made up of two components, initial exposure or accident and resulting injury; neither one without the other would be sufficient. There can be no question but that the aspect of the occurrence which must take place within the policy period, however, is the "result", that is, the time when the accident or injurious exposure produces personal injury. The time-limiting phrase "during the policy period" always follows the word "results" and frequently is set off by commas, so that it can modify only the preceding verb "results". Thus, the definitional language explicitly focuses on the result rather than the cause as the component to which coverage is linked. This is equally true of the American Motorists policies. Even though their coverage clauses refer to "occurrence during the policy period," their definition of occurrence also links the resulting injury, not the exposure to conditions, to the policy period.[3]

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[3] Recently, in *Am. Motorists Ins. v. E. R. Squibb & Sons*, 95 Misc. 2d 222, 406 N.Y.S. 2d 658 (1978) the Supreme Court for New York County adopted the manifestation rule in construing, with respect to claims for cervical cancer caused by the drug DES, an American Motorists policy which provided

The next question to be determined is what the policies mean by "personal" or "bodily injury" given the diseases which gave rise to the underlying claims. The exposure proponents maintain that "personal injury," within the meaning of these policies, occurs when the first subclinical cellular changes take place within the lung. They argue that asbestosis is not a disease at all, but a lengthy injurious process which begins with a series of minute but definite "insults" to the lungs. These insults comprise a succession of separate, compensable personal injuries, each of which, they say, meets the policy's requirement of resulting injury.

The manifestation proponents, on the other hand, contend that with respect to asbestosis, mesothelioma and bronchogenic carcinoma, the policy term "personal injury" refers neither to a lengthy process, nor to a series of microscopic "insults", but to clinically evident, diagnosable disease. In the case of asbestosis, they argue, the "result" does not occur until the accumulated depositioning of asbestos fibers in the lung, with its attendant secretion of destructive enzymes, produces such significant

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coverage for an "accident or injurious exposure to conditions which results, during the policy period, in bodily injury . . . ." In Squibb, the exposure to the drug occurred in 1952, 1953 and 1961, while the disease only became manifest in 1970, 1971 and 1975, in the daughters of mothers who had ingested the drug. The Court found that "the policy language does not limit coverage to incidents of exposure during the policy period, but rather to conditions which result in bodily injury during the policy period. A reading of the policy language would appear to indicate that coverage is predicated not on the act which might give rise to ultimate liability, but on the result. It would be a strained interpretation to construe on the occurrence clause as though it covered "exposure during the policy period which results in bodily injury." It is the result which is keyed to the policy period, and not the accident or exposure." *Id.* at 659-660.

interference with lung function that the victim suffers perceptible, measurable symptoms.

The exposure proponents bolster their arguments with sophisticated medical analyses of the fibrosing process from the time of exposure to the time of disability or death; in fact, an appreciation of these medical details is necessary in order to understand the exposure proponents' concept of minute "insults" to the lung. The manifestation proponents, in contrast, argue that the policy terms must be analyzed from a layman's point of view. When this approach is taken, they say, no medical evidence is necessary; instead, the Court need only look to the common and everyday meaning of terms such as "disease" and "injury", in order to conclude that exposure results in injury when it manifests itself through clinically evident disease.

Because these questions were unresolved at the time of trial, and to aid in interpretation of the relevant language the Court received expert medical testimony from Dr. Bernard Gee, a research scientist and clinician with vast experience in the area of asbestos-related disease, and from Dr. Edward Burger, a researcher and administrator whose testimony was based on a review of current literature in the field and not particularly helpful. With minor exceptions, however, the testimony of the experts was not inconsistent. After careful consideration of that medical evidence, the insurance policy language, and the common meaning of the terms employed therein, I find that exposure to asbestos does not "result" in "personal injury" so as to trigger insurance coverage until such time as the accumulation of asbestos fibers in the lungs produce signs and symptoms capable of diagnosis as an asbestos-related "disease," in the commonly understood meaning of the term "disease." This finding is based on several considerations.

First, the testimony of both experts contradicted the central contention of the exposure theory that exposure

and injury occur either simultaneously, or so nearly so that coverage for injury can most reasonably be linked to the time of exposure. The testimony of the exposure proponents' own expert, Dr. Gee, made it clear not only that exposure to asbestos typically does not produce clinically evident disease for as much as twenty years, but also that the sub-clinical injuries to the lung produced early in the destructive process do not occur simultaneously with the exposure. Before even sub-clinical injury can occur, the asbestos fiber must pass a number of dichotomously branching tubes in the nose and throat which get progressively narrower, must reach the lung and become depositioned there, and must be enveloped by a scavenger cell, an alveolar macrophage which may then begin to produce destructive enzymes in a futile attempt to destroy the indestructible asbestos fiber. Because the fiber is not biodegradable, the macrophage continues to secrete enzymes which eventually destroy surrounding tissue and produce scarring. These tiny lung scars are the "insults" to which the exposure proponents refer. Along the way, nearly all fibers are removed, either through expectoration, by means of the physiological filters in the nose and throat, through being carried back up and out by the mucociliary escalator, or sometimes by being taken away by an alveolor macrophage through the lymphatic system or the mucociliary escalator.[4] Moreover, even when the fiber has become embedded in the lung and the scarring process has begun, the end result, that is, disabling disease or death, is by no means inevitable. In fact, Dr. Gee testified that over 90% of all urban city dwellers have some asbestos-related scarring, but only a tiny percentage of those exposed will ever develop clinical asbestosis. In short, exposure to asbestos does not produce instantaneous sub-clinical cellular changes;

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[4] It is possible that such removal by a macrophage may, however, occur after insult to the alveolar region of the lung from secretion of enzymes by the same macrophage.

some amount of time necessarily passes before any destructive process begins. Also, there is no inevitability to the process—it may simply stop at any point along the way without ever producing clinically evident disease. This being so, to characterize as injury the minimal changes which occur in some people some time after exposure is not a supportable use of the word "injury" in the context of a liability insurance policy.

To say that exposure to asbestos results immediately in personal injury, is unreasonable for another reason. It is a basic tenet of insurance law that unambiguous contract terms are to be given their common, popular and ordinary meaning, 13 J. Appleman Insurance Law and Practice § 7384 (rev. ed. 1976), 43 Am. Jur. 2d Insurance, § 256.[5] Unless the insurance contract explicitly draws upon a technical or scientific meaning of a term, shared by both parties, the Court is to apply the meaning which a non-specialist would understand. *Lincoln Nat. Life Ins. Co. v. Erickson*, 42 F.2d 997, 1001 (8th Cir. 1930), *Reiser v Metropolitan Life Ins. Co.*, 28 N.Y.S. 2d 283, 262 App. Div. 171 (1941) *aff'd.* 289 N.Y. 561 43 N.E. 2d 534 (1942). In this case, while Eagle-Picher, a large manufacturer, might be expected to have technical knowledge relating to its products and enterprises, it cannot be assumed to have had sophisticated medical knowledge of the biochemical details of the asbestosis process,[6] or to have intended that any abstruse or un-

[5] The parties raised before trial the question whether the law of Ohio, of Illinois, or of England should control the interpretation of the insurance contracts at issue here. I find that there is no true conflict among all potentially applicable laws, and therefore I do not reach the question of which state law would be applied to these contracts. *Forsyth v. Cessna Aircraft Co.*, 520 F.2d 608, 612 (9th Cir. 1975).

[6] Dr. Gee agreed that his work is on the cutting edge of one area of the developing science in this field, that indeed, only within the last five to eight years has attention in the field

usual meanings be given to the terms in its product liability insurance policies. Where there is a conflict between a technical or medical definition and the meaning an average person would apply to an insurance term, the court will accept and apply the layman's viewpoint. *Irelan v. Standard Mutual Assoc.*, Mo.App. 379 S.W. 2d 815 (1964). As a result, the Court must interpret the policy from the point of view of the layman.

The policies define personal injury or bodily injury in lay terms, "bodily injury, shock, sickness or disease (including death, mental anguish and mental injury resulting therefrom.)" The exposure proponents assert that asbestosis is a process, not a disease, and that coverage should be provided for a series of minute personal or bodily insults to the lung. The manifestation proponents point out that all of the underlying claims against Eagle-Picher allege fully manifested asbestos-related diseases, not sub-clinical cellular injuries, and they argue that to a layperson, asbestosis or asbestos-related injury means symptomatic diagnosable disease, regardless of what the terms might mean to a research scientist.

Dr. Gee, who is also a clinician with vast treatment experience, proferred his own definition of "asbestosis" as an injury mechanism which is present soon after the first asbestos fiber is embedded in the lung, but went on to distinguish between his specialized meaning of the word in the context of research and the meaning he would give the word as a treating physician. According to Dr. Gee, "when a patient asks 'Do I have asbestosis?' He means: Do I have clinically evident disease by your methods, including my own perceptions, that is, the patient's, ... He doesn't mean: Do I have some injury mechanism going on." Dr. Gee drew the same distinction

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focussed on biochemical cellular changes rather than microscopy and morphology. His testimony is in large part based on that new focus.

again when he said, with reference to a patient's history of exposure to asbestos, and the presence of asbestos in his lung, "If I find asbestos, I cannot conclude without other evidence that there is clinical disease. I can conclude that there is an injury mechanism set in motion." That testimony, combined with the ordinary meaning of the coverage language, leads to the conclusion that exposure to asbestos results in "personal injury" when it produces clinically evident diagnosable disease, that is, when it becomes manifest. Although the injurious process begins many years prior to the eventual manifestation of clinical asbestosis, the phrase "results in personal injury" cannot, absent the application of a hypertechnical definition of the words, refer to the earliest sub-clinical cellular damages, but must refer to the time when the individual has clinically evident disease.

The scope of the Court's analysis so far has been limited to an examination of the text of the policies and to a review of the relevant medical testimony. However, because other courts have come to different conclusions and because the rules of construction governing the interpretation of insurance contracts explicitly serve certain public policy goals, it is appropriate to assess the manifestation theory in a broader context.

The Sixth Circuit, in a recent decision, affirmed the District Court's adoption of the exposure theory.[7] It nevertheless concluded that it was "bound to broadly construe the insurance policies to promote coverage." *Ins. Co. America v. Forty-Eight Insulations*, 633 F.2d 1212, 1219 (6th Cir. 1980)-(hereafter "Forty-Eight"). The underlying facts of the *Forty-Eight* case are, from a

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[7] The *Forty-Eight* opinion was recently adopted both as to "reasoning and result" by the Fifth Circuit, in *Porter v. American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir. 1981). See also, *Keene Corporation v. Ins. Co. of No. Amer.*, No. 78-1011 (D.C. D.C. January 30, 1981).

public policy point of view, substantially different from those at issue here. In that case, Forty-Eight had purchased liability insurance as far back as 1955, but its coverage starting in 1976 contained such a large per person deductible for asbestos cases that the court found that "as a practical matter, Forty-Eight is uninsured for asbestosis occurring after 1976." *Forty-Eight, supra,* at 1216 n.6. This consideration led the Court to reject as not controlling precedents in the area of health insurance which it found to be "most relevan[t]." [8] Although the Court acknowledged that these cases appeared to support the manifestation theory, it nevertheless held that they in fact supported the exposure theory because "the health insurance cases rely on the same rules of construction that we think are applicable here: insurance policies must be strictly construed in favor of the injured and to promote coverage; similarly a policy must be construed to favor the legitimate expectations of the parties."

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[8] The cases cited by the Sixth Circuit are part of a line of cases which, interpreting clauses in insurance policies which exclude from coverage any sickness or diseases originating and commencing prior to the issuance of the policy, nevertheless find in favor of coverage where the disease becomes manifest during the policy period, although the medical cause clearly existed prior to manifestation. See, e.g. *Royal Family Ins. Co. v. Grimes,* 42 Ala. App. 481, 168 So. 2d 262 (1964); *Reiser v. Metropolitan Life Ins. Co.,* 262 App. Div. 171, 28 N.Y.S. 2d 283 (1941) *aff'd.* 289 N.Y. 561, 43 N.E. 2d 534 (1942) (Presence of calcium deposits which might never have become a source of physical disturbance not a disease until manifest. The meaning of the agreement must not be that of the scientist but that of the average person.); *Metropolitan Life Ins. Co. v. Reynolds,* 48 Ariz. 205, 60 P.2d 1070 (1936) ("Defendant is liable, though the medical cause of the disease existed prior to the policy, if the disease or sickness does not manifest itself until afterwards. So ordinary men wanting health protection would understand it." 60 P.2d at 1073); *Fuller v. Aetna Life Ins. Co.,* 259 F.2d 402 (5th Cir. 1958); 10 Couch on Insurance 2d § 41.814 at 639.

Forty-Eight, supra, at 1221. The Court went on to conclude:

> In this case, we are faced with two possible constructions, one of which is likely to leave the manufacturer insured, the other of which leaves the manufacturer uninsured for all practical purposes. We think that Illinois and New Jersey courts [the states whose law was arguably applicable to the insurance contracts] would try to construe the contract language to embrace the exposure theory. *Forty-Eight, supra,* at 1222.[9]

In the present case, the Court is similarly faced with construction which would provide coverage, and another which leaves Eagle-Picher uninsured. Here however, it is the manifestation theory which is like to maximize the coverage provided to Eagle-Picher in the underlying lawsuits. As the earlier discussion demonstrates, this court's adoption of the manifestation theory is grounded on a finding that the relevant text of the insurance policies, as explained by the medical evidence dictates manifestation. An additional strand of support for this conclusion, however, is provided by the fact that application of general rules of insurance policy construction, with their public policy underpinnings, produces the same result.

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[9] The *Forty-Eight* decision appears to rest primarily on considerations of policy and result. However, insofar as it is based on review and interpretation of the medical evidence relating to asbestosis, it rests on findings with which I am not in agreement. The Sixth Circuit accepted the notion that every "insult" to tissue in the lungs constitutes "bodily injury" within the meaning of the applicable insurance policies. My review of the medical evidence persuades me that these sub-clinical changes, only recently identified by the most sophisticated medical research techniques, constitute neither "bodily injury" nor "disease" within the common and ordinary meaning of these terms.

The facts of this case also indicate that manifestation most closely approximates the expectations of the contracting parties. As noted above, Eagle-Picher was uninsured during most of the thirty years up to 1971 during which it manufactured asbestos. Only in 1968 did Eagle-Picher first purchase general liability coverage. During the years after 1971, when Eagle Picher ceased to produce asbestos-containing materials, it nevertheless continued to purchase, and in increasing amounts, insurance coverage for damages due to injury caused by asbestos exposure [See App. A]. Although there was scant possibility that claims based on further exposure to asbestos would be made, it could certainly be predicted that increasingly numerous manifestations of asbestos-related diseases would occur, giving rise to increasingly numerous claims against Eagle-Picher. The fact that Eagle-Picher bought substantial amounts of insurance explicitly keyed to damages due to asbestos exposure during a period when no such exposures were taking place lends further support to the conclusion that the expectation of the contracting parties was that coverage would be provided on a manifestation, rather than an exposure, basis.

Having found in favor of manifestation, a workable definition of the term "manifestation" remains to be delineated. The parties have proffered several possibilities. These include the date on which an asbestos victim "knows or has reason to know" he has the disease, the date on which a victim's symptoms become "capable of medical diagnosis," the date of actual diagnosis, or the date of death. Because of the thousands of underlying lawsuits against plaintiff, each seeking damages for asbestos-related disease, the policies in issue must be interpreted not only to reflect the manifestation concept, but also to ensure that coverage is certain, and the availability of coverage is easily ascertained and easily demonstrated. I conclude that with respect to all claims under the insurance policies at issue in this case, coverage

shall be provided when the asbestos-related disease becomes manifest, as measured by the date of actual diagnosis or, with respect to those cases in which no diagnosis was made prior to death, the date of death. This holding does not require pro rata sharing or apportionment of damages on account of Eagle-Picher's liability for asbestos-related claims.

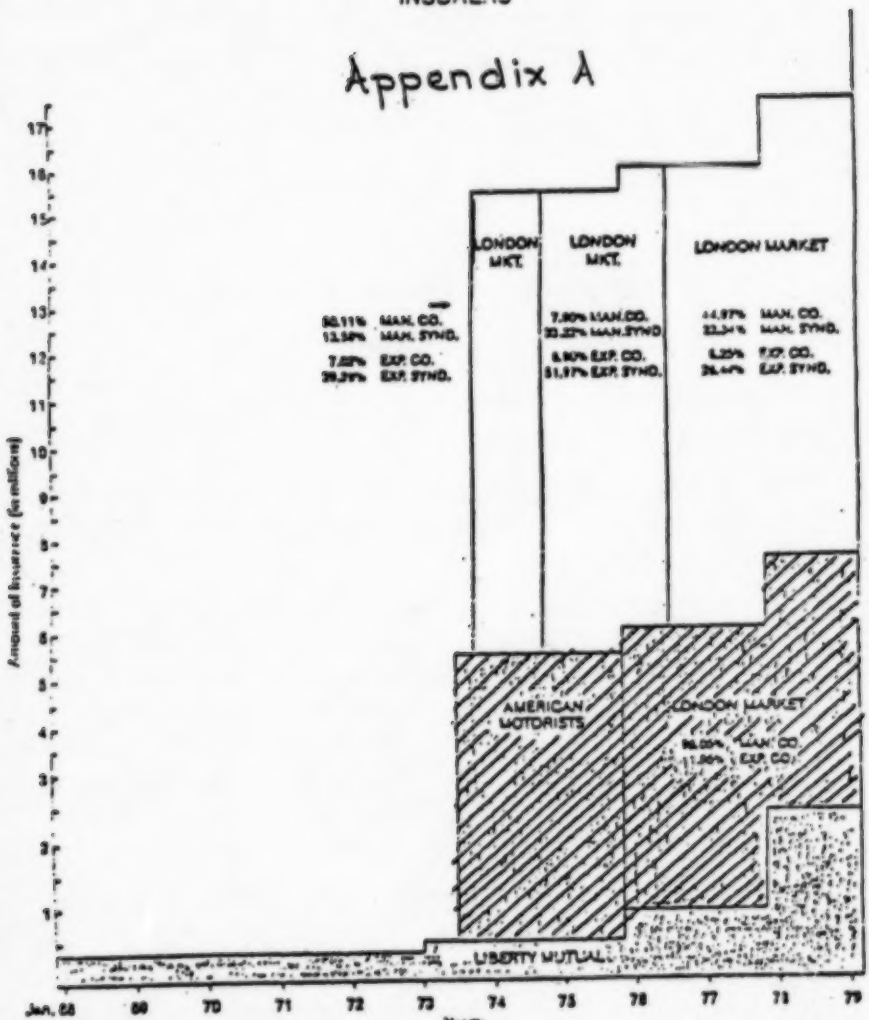
Judgment shall enter in accordance with this opinion.

/s/ Rya W. Tobel
RYA W. TOBEL
District Judge

August 14, 1981
DATE

AMOUNT OF INSURANCE
INSURERS

Appendix A



□ - second layer excess
▨ - first layer excess
▦ - primary

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-2129

COMMERCIAL UNION INSURANCE CO.

v.

PITTSBURGH CORNING CORP., *et al.*

ORDER

AND NOW, this 29th day of October, 1981, it is hereby ORDERED that:

1. A discoverey conference pursuant to Fed. R. Civ. Pro. 26(f) will be held on November 25, 1981, at 12:00 p.m. in Courtroom 8B.

2. Pittsburgh Corning's Motion for Partial Summary Judgment against Travelers Insurance is GRANTED on the ground that the insurer's defense obligations are ambiguous and that, under Pennsylvania law, ambiguous insurance contracts must be strictly construed against the insurer. *E.g., Collister v. Nationwide Life Insurance Co.*, 479 Pa. 579, 388 A.2d 1346 (1978), *cert. denied*, 439 U.S. 1089 (1979).

The court will issue a memorandum opinion at a later date.

3. Pittsburgh Corning's and PPG Industries' motions for summary judgment against Commercial Union are GRANTED.

I take notice of the indisputable scientific fact that cumulative physical damage resulting from asbestos inhalation occurs *prior* to manifestation. As a matter of law, such exposure is a covered occurrence during the policy period which results in injury. At a minimum,

the policy language is ambiguous, and must be construed against the insurer.

The court will issue a full memorandum opinion at a later date.

BY THE COURT:

/s/ James L. Giles
JAMES L. GILES

Entered: 11-2-81
Clerk of Court

APPENDIX E

Other Declaratory Judgment Actions Involving Manifestation-Exposure Coverage Dispute in Connection With Asbestos Litigation

1. *A C and R Insulation Co., Inv. v. Firemen's Fund Insurance Co.*, No. 350-81 (D.C. Super. Ct.)
2. *American Motorist Insurance Co. v. Phillip Carey Corp.*, No. 79-0518 (S.D. N.Y.)
3. *American Mutual Liability Ins. Co. v. Eastern Refractories Co.*, No. 80-3768 (Mass. Super. Ct., Middlesex Div.)
4. *Armstrong Cork Co. v. Aetna Casualty & Surety Co.*, No. C-315367 (Cal. Super. Ct., Los Angeles County)
5. *Asten Group v. Commerce & Industry Insurance Co.*, No. 58-19 (Pa. C.P., Philadelphia County)
6. *Centennial Insurance Co. v. North American Asbestos Co.*, No. 80-CH43 (Ill. Cir. Ct., McLean County)
7. *Celotex Corp. v. Aetna Casualty & Surety Co.*, No. 79-5885 (Fla. Cir. Ct., Hillsborough County)
8. *Crown Cork & Seal v. Aetna Casualty & Surety Co.*, No. 1292 (Pa. C.P., Philadelphia County)
9. *Commercial Union Ins. Co. v. Johns-Manville Corporation*, No. 80-306-N (D. Mass.)
10. *Commercial Union Ins. Co. v. Sepco Corp.*, No. 81-769 (E.D. La.)
11. *Commercial Union Ins. Co. v. Unarco Industries, Inc.*, No. 81L 802 (Ill. Cir. Ct., Cook County)
12. *Fireman's Fund Insurance Co. v. Fibreboard Corp.*, No. 753-885 (Cal. Sup. Ct., San Francisco County)
13. *GAF Corp. v. Insurance Company of North America*, No. C-286217 (Cal. Sup. Ct., Los Angeles County)

14. *Insurance Company of North America v. Nicolet Industries, Inc.*, No. 971955 (Ohio C.P., Cuyahoga County)

15. *Johns-Manville Corp. v. Home Insurance Co.*, No. 765226 (Cal. Super. Ct., San Francisco County)

16. *Liberty Mutual Insurance Co. v. Armstrong Cork Co.*, No. 80-429-G (D. Mass.)

17. *Standard Asbestos Manufacturing & Insulating Co. v. Royal Indemnity Insurance Co.*, No. CV80-14909 (Mo. Cir. Ct., Jackson County)

18. *Zurich Insurance Co. v. Raybestos Manhattan, Inc.*, No. 78-L-8760 (Ill. Cir. Ct., Cook County)

APPENDIX F

Corporations Affiliated With Petitioner Insurance Company of North America

The parent company of Insurance Company of North America (INA) is INA Financial Corp., a subsidiary of INA Corp. The following corporations are affiliates of INA: Life Insurance Co. of North America; INA Life Insurance Co.; Horace Mann Life Insurance Co.; Hospital Affiliates International, Inc.; and AID, Inc. The following corporations are subsidiaries of INA: Alaska Pacific Insurance Co.; INA Insurance Co. of Illinois; INA Insurance Co. of Ohio; Indemnity Insurance Co. of North America; F.S. Titles Services, Inc. and its affiliates, Fidelity National Title Insurance Co. and Southern Title Guaranty Co., Inc.

Opposition

Nos. 81-1012, 81-1197, 81-1298 and 81-1328

Office - Supreme Court, U.S.
FILED
FEB 18 1982
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

AETNA CASUALTY & SURETY COMPANY,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

LIBERTY MUTUAL INSURANCE COMPANY,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

On Petitions For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT KEENE CORPORATION IN OPPOSITION TO PETITIONS

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Nos. 81-1012, 81-1197, 81-1298 and 81-1328

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

AETNA CASUALTY & SURETY COMPANY,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

LIBERTY MUTUAL INSURANCE COMPANY,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

On Petitions For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT KEENE CORPORATION IN OPPOSITION TO PETITIONS

STATEMENT OF THE CASE

This case involves the interpretation and application under state law of comprehensive general liability insurance policies which the insurance company petitioners jointly drafted.

Keene[1] purchased insurance from the insurance company petitioners.[2] The policies insure against legal liability—a type of coverage sold by the American insurance industry for many years.[3] Keene has been named as a defendant in thousands of asbestos liability lawsuits. Each of the insurance company petitioners avoided its obligations to provide a defense and coverage for such cases and Keene commenced this action to enforce its rights under the policies.

The specific state law contract issues addressed in the court of appeals were the "trigger" of insurance coverage and the "scope" of insurance coverage for the asbestos liability lawsuits against Keene. The "trigger" of coverage is the event or condition that determines whether an insurance policy applies to a claim. "Scope" is the term used to describe the amount of coverage provided once an insurance policy is triggered.

The uniform insuring clause of the comprehensive general liability policies sold by the insurance company petitioners to Keene clearly provides coverage for Keene's legal liability for "all sums" which are paid to the claimants in the underlying asbestos lawsuits:

> [t]he [insurance] company will pay on behalf of the *insured* [policyholder] all sums which the *insured* shall become legally obligated to pay as damages because of *bodily injury* . . . to which this insurance applies, caused by an *occurrence*, and the company

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[1] As used herein "Keene" includes its former subsidiary and that subsidiary's predecessors.

[2] The insurance company petitioners are referred to in this brief as follows:

1. Insurance Company of North America, petitioner in No. 81-1012, as "INA".

2. Hartford Accident & Indemnity Co., petitioner in No. 81-1197, as "Hartford".

3. Aetna Casualty and Surety Co., petitioner in No. 81-1298, as "Aetna".

4. Liberty Mutual Insurance Company, petitioner in No. 81-1328, as "Liberty Mutual" or "Liberty".

[3] Annot., 37 A.L.R. 644 (1925).

> shall have the right and duty to defend any suit against the *insured* [policyholder] seeking damages on account of such *bodily injury* . . . even if any of the allegations of the suit are groundless, false or fraudulent . . .

Keene Corp. v. Insurance Co. of North America, Nos. 81-1179/80/81/82 (D.C. Cir. Oct. 1, 1981) slip op. at 6.

While the insurance company petitioners' policy language is uniform, there is nothing uniform in the inconsistent and widely divergent interpretations of the identical policy language urged upon this Court by the different insurance companies.

The petitioners have created a specious controversy which they have called "pro rata exposure"[4] versus "manifestation" in order to describe their conflicting theories of insurance coverage. Extensive factual discovery at the district court level confirmed that the "pro rata exposure" and "manifestation" theories were Hobson's choices newly fabricated by the insurance company petitioners to avoid their contractual responsibility to their policyholders to pay "all sums."[5] Each position, as applied to Keene, provides little or no real coverage for Keene's asbestos claims.

In asbestos cases, there often is a long period of time between the causative acts; *e.g.*, inhalation of asbestos fibers by the claimant, and knowledge that injury is present; *e.g.*, manifestation. Thus, manifestation as the sole trigger of coverage avoids the application of hundreds of millions of dollars of prior insurance coverage by assigning losses to

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[4] Pro rata exposure is sometimes called "inhalation exposure".

[5] The *Forty-Eight* case, *Insurance Company of North America* v. *Forty-Eight Insulations, Inc.*, 451 F.Supp. 1230 (E.D. Mich. 1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on reh'g*, 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (U.S. Dec. 8, 1981), *petition for reh'g pending*, was commenced by INA in 1977 shortly after it switched its coverage position to a manifestation position. 451 F.Supp. at 1239. In fact, the evidence in *Keene* shows that INA's switch to a manifestation position was largely attributable to economic considerations. INA recognized, on the one hand, that it would continue to have tremendous liability (approximately $489 million) under the policy language, but, on the other hand, that its liability would be "practically nil" using the manifestation theory. J.A. V at 1666-67, 1715. ("J.A." references herein are to the Joint Appendix below).

current years when little or no insurance is available for asbestos claims because the insurance industry has generally ceased writing such coverage. A pro rata exposure result, on the other hand, assigns losses to early periods when insurance limits were very low, the policies have been lost, and/or the records have been destroyed by the insurance companies. Manifestation and pro rata exposure ignore the bulk of the insurance applicable during the years that injury was progressing "in residence" in the bodies of the claimants.

The court of appeals rejected the conflicting and incomplete coverage positions advocated by the insurance company petitioners and adopted the position presented by Keene in the district court and the court of appeals. The court of appeals recognized that "Keene contended that any stage in the progression of an asbestos-related disease triggers coverage of Keene's entire liability under each of the policies" (slip op. 7) and held that this is the proper legal construction of the policies under state law. Slip op. at ll. This holding is supported by (a) the policy language; (b) insurance company documents in the record below; and (c) the medical evidence that shows that asbestos-related injuries are indivisible and the quantum of injury which occurs at any point during the injurious process is indeterminate.

The record below also abounds with evidence of the switches in coverage positions by the insurance company petitioners, plainly for economic reasons, and of the inconsistencies between their current coverage positions and their internal *ante litem motam* interpretations of the policy language they drafted. Petitioners nevertheless continue to campaign for their self-serving coverage positions without any record or legal support.

SUMMARY OF ARGUMENT

The decision below involved state law questions of insurance contract interpretation and does not present issues that merit review by this Court. Completely contrary to *Erie* and the McCarran-Ferguson Act, the insurance company petitioners are

asking this Court to federalize insurance contract interpretation questions.

The insurance company petitioners attempt to contrive a conflict among the U.S. Courts of Appeals for the District of Columbia, Fifth[6] and Sixth[7] Circuits. Their rhetoric completely ignores the fact that the result in each case reflected the interpretation of state law in light of the facts, legal positions and relief requested.

Certiorari should be denied here, as well, since the court of appeals correctly interpreted the policy language. The decision reflects the intent of the insurance company petitioners who drafted the policy language, the factual record, including the medical evidence, and the applicable state law. The court of appeals also correctly held that state law requires an insurance company to prove a disclaimer of insurance coverage before that company refuses to defend or pay the claims against its policyholder.

Finally, contrary to the contentions of a single petitioner, the court of appeals correctly held that the controversy is justiciable.

THE WRITS SHOULD BE DENIED

A. THE INTERPRETATION OF INSURANCE CONTRACTS UNDER STATE LAW IS NOT AN ISSUE WARRANTING CERTIORARI

The court of appeals interpreted insurance contracts under state law. The holding of a federal court of appeals on a matter of state law plainly does not create an issue justifying review by this Court.[8] *Pierson* v. *Ray*, 386 U.S. 547, 558 (1967); *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). Even if there were

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[6] *Porter* v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (U.S. Dec. 8, 1981), *petition for reh'g pending* ("Porter").

[7] *Forty-Eight.*

[8] The current version of this Court's Rule 17 omits any reference, such as that included in former Rule 19, to a court of appeals decision that resolves "an important state or territorial question in a way in conflict with applicable state or territorial law."

conflicting decisions, "[a]s to questions controlled by state law, however, conflict among the circuits is not itself a reason for granting *certiorari*. The conflict may be merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938). The insurance company petitioners acknowledge these principles.[9]

Strong reasons which support denial of *certiorari* in this case are found in the briefs filed by petitioners Hartford and Liberty Mutual in the *Forty-Eight* and *Porter* cases. In its brief opposing *certiorari* in *Forty-Eight* (at 3), Hartford stated to this Court that "considered determinations of state law by these intermediate appellate courts present no question worthy of review by this Court". Hartford further stated to this Court in its brief opposing *certiorari* in *Porter* (at 7) that "[a] decision by this Court on these narrow state law issues would not bind other states and accordingly would have no nationwide significance." In its *certiorari* petition in *Forty-Eight*, Liberty argued (at 6-7) that the asbestos insurance coverage issues presented a "matter of contract interpretation as to which this Court's exercise of its *certiorari* power would not be appropriate."

Hartford and Liberty fail to explain why the same matters of contract interpretation warrant *certiorari* in this case, but not in *Forty-Eight*.

The insurance company petitioners and *amici* all concede that *Keene*, *Forty-Eight* and *Porter* all involve solely state law questions and not federal questions. Thus, the decision of the court of appeals interpreting insurance contracts under state law does not present any question worthy of review by this Court.[10]

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[9] *See*, Hartford's petition at 7; INA's petition at 10; Liberty Mutual's petition at 27. Keene also submits that there is no real conflict in the cases.

[10] In *Forty-Eight*, the laws of Illinois and New Jersey were considered (633 F.2d at 1219); in *Porter* the law of Louisiana was considered (641 F.2d at 1137); and in *Keene* the laws of New York, Pennsylvania, Delaware, Connecticut and Massachusetts were "potentially applicable" (slip op. at 10-11 n.10). The court of appeals correctly analyzed the applicable state law, finding that "the basic principles governing the interpretation of insurance policies are the same" in each of the "potentially applicable" jurisdictions in the *Keene* case. *Id.*

B. THIS COURT SHOULD NOT FEDERALIZE STATE INSURANCE COVERAGE QUESTIONS

The essence of the pending petitions is stated by petitioner INA: "In these circumstances, a uniform federal decision correctly applying uniform state law is needed."[11]

In *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 75 (1938), this Court foreclosed federal courts in diversity cases from "promot[ing] uniformity of law throughout the United States." A natural consequence of *Erie* is that similar cases may be decided differently under different state laws without warranting review by the Court.

1. Federalizing Insurance Coverage Questions is Contrary to the McCarran-Ferguson Act

Congress has declared that the business of insurance is a state function. McCarran-Ferguson Act, 15 U.S.C. §§1011-1015 (1976).

15 U.S.C. § 1011 provides:

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1012(a) provides:

> (a) The business of insurance, and every person engaged therein shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

These provisions were analyzed by this Court in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 460 (1969), which held that the "business of insurance" includes the "interpretation" of insurance contracts.[12] Thus, the efforts of the petitioners to have

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[11] INA Petition at 9.

[12] The efforts of the petitioning insurance companies and *amici* to federalize state law insurance contract interpretation matters contradict their persistent efforts otherwise to avoid federal oversight. *See* 1945 U.S. Code Cong. Service 670, 672-73.

this Court review the court of appeals' interpretation, under state law, of their insurance contracts, and construct a uniform federal rule violate congressional policy expressed in the McCarran-Ferguson Act.

2. Insurance Coverage Disputes Have Not Heretofore Been Federalized

As the Travelers Indemnity Company of Rhode Island ("Travelers") stated to this Court in its brief opposing *certiorari* in *Forty-Eight* (at 14), "[t]he risk of inconsistent applications of identical policy terms is a risk assumed by every insurer that transacts business in more than one state." Inconsistent results have been reached, applying the laws of different states, with respect to interpretation of insurance policy language involving a variety of coverage issues. Such inconsistent results have occurred, for example, in coverage cases involving punitive damages,[13] building collapse,[14] the completed operations hazard[15] and the "business pursuits" exclusion[16] to cite just a few.

The scenario of "chaos" and administrative confusion asserted by the insurance company petitioners to justify federalizing insurance contract interpretation questions therefore is a smokescreen.

A decision on insurance contract interpretation by this Court would not affect the handling of the underlying asbestos cases.[17] Underlying cases will continue to be filed, dismissed, settled or tried. Even if the alleged administrative difficulties existed in the underlying cases, petitioners would not be

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[13] Annot., 20 A.L.R.3d 343 (1968); Burrell & Young, *Insurability of Punitive Damages*, 62 Marquette L.Rev. 1, n.1 (1978).

[14] Annot., 71 A.L.R.3d 1072 (1976).

[15] Annot., 58 A.L.R.3d 12 (1974).

[16] Annot., 48 A.L.R.3d 1096 (1973).

[17] Proposed *amici* American Home Insurance, *et al.* agreed in their brief in *Forty-Eight* (at 3) that a decision by this court will not affect the large number of underlying asbestos lawsuits filed throughout the country.

(footnote continues)

excused from performing their contractual obligations under state law. *See, Consolidated Laboratories, Inc.* v. *Shandon Scientific Co.*, 413 F.2d 208, 212 (7th Cir. 1969); *Bloor* v. *Falstaff Brewing Corp.*, 454 F.Supp. 258, 267 (S.D.N.Y. 1978), *aff'd*, 601 F.2d 609 (2d Cir. 1979).

In summary, for this Court to accept the insurance company petitioners' invitation to craft a uniform federal rule of insurance contract interpretation would be contrary to *Erie*, contrary to the clearly expressed intent of Congress, and contrary to the insurance industry's opposition to the application of federal law to the business of insurance.[18]

C. THERE IS NO REAL CONFLICT

Even though different rulings on questions of state law would in no event justify *certiorari*, there is, in fact, no real

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(footnote continued)

The insurance company hyperbole about the purported unforeseeability of the current volume of tort liability cases also should be discounted. An insurance industry participant in the drafting of the standard comprehensive general liability insurance policy form acknowledged in 1966 that " '[e]xperts project that in the next decade products liability litigation will exceed automobile accident cases in our courts'". Gowan, *Completed Operations and Products Liability Insurance Coverage of the New Comprehensive General Automobile Policy*, American Bar Association Section of Insurance, Negligence and Compensation Law 265 (1966).

[18] This Court recently declined to review a decision that had refused to apply federal common law to thousands of Agent Orange tort cases. *Chapman* v. *Dow Chemical Co.*, No. 80-1882, *cert. denied.*, 50 U.S.L.W. 3487 (U.S. Dec. 15, 1981).

Furthermore, *certiorari* was denied in *Johns-Manville Corp.* v. *White*, No. 81-882, *cert. denied*, 50 U.S.L.W. 3548 (U.S. Jan. 12, 1982), where an effort had been made to review a decision extending admiralty jurisdiction to thousands of asbestos claims. That case, unlike the insurance coverage cases, had involved issues in thousands of asbestos cases pending throughout the country. Years ago, this Court denied *certiorari* in *Borel* v. *Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). *Borel* imposed joint and several liability on manufacturers and fabricators of asbestos products. That holding led to the filing of many asbestos cases and established one type of legal liability which the court of appeals held was covered by Keene's insurance.

conflict among the courts of appeals decisions. Every court of appeals that has reviewed legal liability insurance coverage for asbestos cases has held that the operative policy language is ambiguous and construed the ambiguities in favor of the position advanced by the policyholder. Furthermore, the relief granted was not the same in each case because the facts, issues, arguments, and relief requested were different:

1. In *Forty-Eight* and *Porter,* the parties urged the two insurance industry triggers of coverage—inhalation exposure versus manifestation. The trigger of continuing injury including the period of exposure in residence until manifestation *was not* addressed by the parties or the courts.[19]

2. In *Forty-Eight,* the issue of prorating damages to the policyholder *was not* before the appellate court and that decision does not conflict with *Keene* on this issue. The policyholder there, unlike Keene, accepted proration in the district court. 633 F.2d at 1224. However, that policyholder did not have available the documentary record available in *Keene* showing the rejection of the proration concept by the insurance industry.

3. In *Porter,* prorating damages or defense expenses to the policyholder *was not* in issue since *Porter* was a dispute solely among insurance companies as to the two insurance industry theories of coverage, pro rata exposure versus manifestation.

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[19] While Hartford, in particular, feigns surprise at the court of appeals decision which interpreted the entire period of injury, including exposure in residence, as triggering insurance coverage, its own medical witness, Dr. Gaensler, testified in support of "exposure in residence" (J.A. IX at 3335; emphasis added):

> And *one would see more inflammation and more fibrosis* and, perhaps, beginning reorganization of the lung with microscopic honeycombing, *because the fibers continue to do their damage and the macrophage is attempting to engulf these, will continuously by themselves do damage so that the process will be progressive, despite the fact that there has been no further inhalation.*

The other medical experts were unanimously in agreement with Hartford's Dr. Gaensler. Moreover, none of the petitioners objected to the receipt of Keene's evidence in the district court which demonstrated that injury occurs "in residence". *E.g.,* J.A. VII at 2401.

4. In general, *Forty-Eight* and *Porter* involved completely different facts than *Keene.*[20] *Forty-Eight* and *Porter* included none of the substantial documentation of insurance industry conduct and insurance policy interpretation which fully support the decision in *Keene.* Also, the medical record in *Keene,* but not in the other cases, extensively demonstrated that injury occurs in asbestos cases at inhalation, in residence even after the cessation of inhalation, and at manifestation.

The absence of any real conflict among the decisions is confirmed by the recent asbestos insurance coverage decision in *Commercial Union Insurance Company* v. *Pittsburgh Corning Corp.,* No. 81-2129 (E.D. Pa. Dec. 4, 1981).[21] In that case, Commercial Union sought to obtain a manifestation coverage result for Pittsburgh Corning's asbestos cases, but the district court rejected manifestation as the sole trigger of coverage. Instead, in considering whether *Keene, Forty-Eight* and *Porter* were in conflict, the district court correctly noted that "[m]y holding accords with that of each circuit which has reached the issue" (mem. op. at 25).

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[20] *Eagle-Picher Industries, Inc.* v. *Liberty Mutual Insurance Co.,* 523 F.Supp. 110 (D. Mass. 1981), *appeals docketed,* Nos. 81-1761/62/63 (1st Cir. Sept. 25, 1981), does not conflict with *Keene* either since each case granted the relief sought by the policyholder based on different facts. Furthermore, a purported conflict between a circuit court decision and a district court decision which is on appeal would not warrant *certiorari.* In *Eagle-Picher,* the policyholder sought a manifestation result in the district court since it had a separate written agreement with its primary insurance carrier which provided for the date of diagnosis as the trigger of coverage and apparently did not have provable insurance coverage before 1968. The policyholder now has appealed from the district court's decision.

[21] A copy of the *Pittsburgh Corning* opinion appears at Appendix A to Keene's Opposition to Motion for Leave to File Brief *Amicus Curiae* of Commercial Union Insurance Companies. Some of the petitioners and insurance company *amici* contend that the insurance contracts in issue are not adhesion contracts. Yet, the holding in *Pittsburgh-Corning* specifically rejected the same effort made by the insurance companies to obtain a rule "requiring courts to balance the economic resources of the parties to insurance contracts" (mem. op. at 9). This holding is supported by INA's candid admission that the insurance policies are "standard insurance policies in effect throughout the nation." INA petition at 9.

The superficial differences in the courts of appeals decisions fall far short of creating any real conflict. Instead they reflect a diversity of issues, arguments and relief requested and the application of the principle that ambiguous insurance policy language is to be construed in favor of the policyholder. *E.g.*, *Moffat* v. *Metropolitan Casualty Insurance Co.*, 238 F.Supp. 165, 171 (M.D. Pa. 1964).

D. THE BURDEN OF PROOF HOLDING IS CORRECT

Under state law principles, the decision below correctly placed the burden of supporting a disclaimer of insurance coverage on the disclaiming insurance company. Thus, the decision does not deviate from *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938).[22]

The insurance company's duty, under a comprehensive general liability insurance policy, to defend a case brought by a third party against a policyholder is determined by *allegations* in the complaint against the policyholder.[23] As a result, there is no requirement, as the petitioners urge, that those allegations be proved before the insurance company is obligated to proceed with defense of the action.

Instead, the insurance company, and not its policyholder, must investigate the facts and establish a basis for denying coverage prior to refusing to defend an action against the

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[22] INA, Liberty and Aetna raised the burden of proof issue in their unsuccessful petitions for *certiorari* in the *Forty-Eight* and *Porter* cases. Furthermore, in *Sindell* v. *Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980), a decision affecting thousands of DES tort cases, the petitioners unsuccessfully urged that the lower court decision there improperly had placed the burden of disproving liability on the defendant manufacturers.

[23] *E.g.*, *Lee* v. *Aetna Casualty & Surety Co.*, 178 F.2d 750 (2d Cir. 1949); *C. Raymond Davis & Sons, Inc.* v. *Liberty Mutual Insurance Co.*, 467 F.Supp. 17 (E.D. Pa. 1979); *Stichman* v. *Michigan Mutual Liability Co.*, 220 F. Supp. 848 (S.D.N.Y. 1963); *Clarke* v. *Fidelity and Casualty Co. of New York*, 285 N.Y.S.2d 503, 55 Misc.2d 327 (Sup. Ct. 1967).

policyholder.[24] This obligation is precisely the burden of proof rule enunciated below by the court of appeals and follows state law principles.

The burden of proof rule stated in *Keene, Forty-Eight* and *Porter* is exactly that espoused by Hartford. Hartford stated in its *amicus curiae* brief in *Forty-Eight,* that "an insurer which can demonstrate in any particular case that no bodily injury occurred during its policy period despite exposure to asbestos would not be liable" (at 5).

Thus, there is no reason to review the court of appeals' holding which correctly requires the insurance companies to support a disclaimer of coverage in third-party cases.[25]

E. THE DECISION OF THE COURT OF APPEALS IS CORRECT AS A MATTER OF STATE LAW AS APPLIED TO THE FACTS OF THIS CASE

1. Legal Principles

The court of appeals held that injury, including continuing injury, triggers insurance coverage under each of the policies in force during the injurious process. That holding simply restates the policy language and follows analogous cases that have applied state law.

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[24] *E.g., International Paper Co.* v. *Continental Casualty Co.*, 35 N.Y.2d 322, 361 N.Y.S.2d 873, 320 N.E.2d 619 (1964); *Clarke* v. *Fidelity and Casualty Co. of New York*, 285 N.Y.S.2d 503, 55 Misc.2d 327 (Sup. Ct. 1967).

[25] The petitioners' reliance upon cases involving *first-party claims* directly against the insurance company under some type of life, casualty, or disability insurance policy is misplaced. Those policies do not involve the duty to defend because there is no third-party claim against the policyholder. Even the "liability insurance" line of cases cited by Liberty (at 14 n.14) involved first-party claims and not third-party claims such as the asbestos claims against Keene.

For example, a series of decisions in the New York federal courts involving Tenneco Chemicals, Inc.,[26] each involved harmful exposure to a drug, a long period of exposure "in residence" and, ultimately, manifestation.

The insurance companies on the risk during the period of internal exposure "in residence" in the *Tenneco* cases, as in *Keene,* were held liable, under New York state law, to protect the policyholder, even though they were not on the risk either at the time of the acts causing the injury (initial exposure to the drug) or at manifestation. In one such case, the court held that *each* insurance company on the risk during that period of injury was severally liable to Tenneco without apportionment. *Tenneco Chemicals, Inc.* v. *Continental Casualty Co.,* No. 78 Civ. 2188 (S.D.N.Y. May 16, 1979) at 11. (J.A. V at 1890). INA was one of the defendants in that case.

In *Emons Industries, Inc.* v. *Liberty Mutual Fire Insurance Co.,* 481 F.Supp. 1022 (S.D.N.Y. 1979), the duty to defend underlying DES liability cases under New York law was in issue. There was no dispute that one primary insurance company, Liberty Mutual, insured Emons for *six years* from 1964-70 and another insurance company, *Reserve,* insured Emons for one year in 1970-71. Whether Emons had purchased pre-1964 coverage was in doubt. Under these facts, the district court held that the duties of the two insurance companies to defend the policyholder were "*coextensive*" and that "both insurance companies stand on equal footing with respect to potential liability and their concomitant duty to defend." (at 1026). Liberty was one of the defendants in *Emons.*

Other cases throughout the country have reached results similar to the decision in the court of appeals. For example, *Gruol Construction Co.* v. *Insurance Co. of North America,* 11 Wash. App. 632, 524 P.2d 427 (Ct. App. 1974), involved

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[26] *Tenneco Chemicals, Inc.* v. *Continental Casualty Co.,* No. 78 Civ. 2188 (S.D.N.Y. May 16, 1979); *Tenneco Chemicals, Inc.* v. *Employers Mutual Liability Insurance Co.,* [1977] Fire and Casualty Cases (CCH), at 77-940 (S.D.N.Y. 1977); *Tenneco Chemicals, Inc.* v. *Employers Mutual Liability Insurance Co.,* [1968] Fire and Casualty Cases (CCH), at 68-984 (S.D.N.Y. 1968).

insurance coverage for damage to a building caused by dry rot which resulted from defective backfilling at the time of construction. The defective backfilling occurred in 1964, and the dry rot was first discovered in 1968. In determining which insurance company covered the damage, the Court concluded that continuous damage triggered complete coverage under each of the *three* insurance policies on the risk during the entire "process" beginning with the time of the first negligent act and continuing through discovery of the condition. 524 P.2d at 430. As here, the court thus held all of the carriers fully liable. 524 P.2d at 431; *accord, American Mutual Liability Insurance Co.* v. *Agricola Furnace Co.,* 236 Ala. 535, 183 So. 677 (Ala. 1938). INA was one of the defendants in *Groul.*

Similar issues also were presented in *Transamerica Insurance Co.* v. *Bellefonte Insurance Co.,* 490 F.Supp. 935 (E.D. Pa. 1980), which involved ingestion by pregnant women of drugs which allegedly caused the birth of deformed children. Ingestion occurred during the policy period of the plaintiff insurance company and the deformed births occurred during the policy period of the defendant insurance company. The court rejected each insurance company's effort to impose exclusive liability on the other (at 938-39), reasoning that injury had occurred *both* when the fetus suffered deformities in the womb during the plaintiff Transamerica's policy period and at birth during the defendant Bellefonte's policy period. Both insurance companies, as here, were held equally responsible to the policyholder.

Similarly, where an injury starts during an insurance policy period, and continues beyond the expiration of the policy period, courts uniformly have held that the insurance company remains liable for the continuing injury. *See Snapp* v. *State Farm Fire and Casualty Co.,* 206 Cal.App.2d 827, 24 Cal. Rptr. 44 (Cal. App. 1962) and *Harman* v. *American Casualty Co. of Reading, Pennsylvania,* 155 F.Supp. 612 (S.D. Cal. 1957). These holdings also provide direct support for the decision in the court of appeals.

Numerous manifestation theorists misconstrue *American Motorists Insurance Co.* v. *E.R. Squibb & Sons,* 95 Misc.2d 222,

406 N.Y.S.2d 658 (Sup. Ct. 1978), a lower New York state court decision involving insurance coverage for DES in which manifestation was advanced as the sole trigger of coverage. However, *American Motorists* does not conflict with the decision below since its facts were different as were the positions asserted.

In *American Motorists,* the court held that insurance coverage applied at the time of "bodily injury during the policy period" and decided as a factual matter that such injury occurred in DES cases at manifestation since there was insurance available at manifestation. 406 N.Y.S.2d at 659.[27] In asbestos cases, little or no insurance is available at manifestation.

A later New York state court decision held that *American Motorists* does not address "whether coverage should include, *as the policy appears to state,* injuries occurring during the term which do not become discovered until some time later." *Schultheis* v. *Centennial Ins. Co.,* 108 Misc.2d 725, 438 N.Y.S.2d 687, 689 (Sup. Ct. 1981)(emphasis added). The statement in *Schultheis* supports the holding in *Keene.*[28]

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[27] The Court did not reach the question of whether injury occurred before manifestation. *Emons, supra,* found that *American Motorists* was a lower court case which was not appealed and "is not dispositive" as an expression of New York law. 481 F.Supp. at 1027.

[28] The petitioning insurance companies rely on cases relating to completely different insurance policies. Health insurance policies and workers' compensation policies are not the same policies as the legal liability policies involved in this case. The reliance upon irrelevant cases, such as *Reiser* v. *Metropolitan Life Insurance Co.,* 262 A.D. 171, 28 N.Y.S.2d 283 (1941), *aff'd mem.,* 289 N.Y. 561, 43 N.E.2d 534 (1942), construing "bodily injury or disease" in the context of health insurance is misplaced. The policyholder in health insurance coverage cases typically seeks insurance protection for illness that is discovered after the purchase of the insurance. Thus, the results in these cases do not allow a hidden condition to defeat coverage. The coverage results in workers' compensation cases reflect legislative policy or administrative regulations, vary from jurisdiction to jurisdiction and cannot be read to support manifestation as a trigger of legal liability insurance coverage.

The petitioners fare no better under the statute of limitation cases. Utilizing the alleged date of manifestation for purposes of determining when

(footnote continues)

2. Factual Record

Contrary to the assertions of the petitioners, the decision of the court of appeals, with respect to both the trigger of coverage and scope of coverage is firmly supported by the ample factual record in this case. This record included a nine-volume appendix documenting insurance industry conduct and policy interpretation and three days of medical testimony which addressed the injury process in asbestos cases.

a. *Trigger of Coverage*

The court of appeals correctly held that coverage under the comprehensive general liability insurance policies is triggered by injury during the policy period. Documents prepared by the insurance industry, including the petitioners, confirm that the petitioners intended to trigger coverage by "injury"[29] during the policy period and not solely by inhalation exposure or manifestation.[30]

(footnote continued)

the statute of limitations begins to run is based on public policy considerations not relevant to a contract interpretation dispute involving the determination of the trigger of insurance coverage. *Karjala* v. *Johns-Manville Products Corp.*, 523 F.2d 155, 161 (8th Cir. 1975); *accord, Tijsseling* v. *General Accident, Fire & Life Assurance Corp.*, 55 Cal.App.3d 623, 127 Cal.Rptr. 681, 684 (1976). In fact, in New York, dates of injury, and *not* manifestation, activate the statute of limitations. *Thornton* v. *Roosevelt Hospital*, 47 N.Y.2d 780, 781, 417 N.Y.S.2d 920, 922, 391 N.E.2d 1002, 1003 (1979). *See* court of appeals discussion, slip op. at 16-17 n.17.

[29] The manifestation proponents would have this Court limit its consideration of the policy language to the word "disease." The policy language definition, however, is expansive and not restrictive since "bodily injury means bodily injury, sickness or disease."

[30] Certain petitioners mistakenly imply that the occurrence is the trigger of insurance coverage. The policies in issue here, though, are not triggered by an occurrence; *i.e.*, an act or omission, during the policy period. The causative act or occurrence can take place prior to the policy period. It is the happening of the injury during the policy period that "triggers" or brings a particular policy into play. In some "occurrence" policies, it is the act that triggers coverage. *See, Insurance Company of North America* v. *Sam Harris Construction Company, Inc.*, 22 Cal.3d 409, 149 Cal.Rptr. 292, 583 P.2d 1335 (1978).

For example, a 1965 internal document of petitioner Liberty construed the applicable policy language in a manner which directly supports the holding of the court of appeals:

> This means that the policy in force when a particular injury or damage takes place is the one which applies, regardless of when the causing accident took place. *So if the injury or damage from waste disposal should continue after the waste disposal ceased, as it usually does, it could produce losses on each side of a renewal date, and in fact over a period of years, with a separate policy applying each year.*
>
> * * *
>
> The policy limits are renewed every year, so the underwriter of a manufacturing risk may have his limits pyramid under this new contract.

J.A. IV at 1592 (emphasis supplied).

An Aetna document similarly states that injury, and not inhalation exposure or manifestation, is the proper trigger of coverage:

> As I am sure you know, the definition of occurrence has *no requirement that the exposure to conditions and the bodily injury be simultaneous. The test is whether or not the bodily injury results during a given policy period.* So, the critical question is whether or not a claimant suffered 'injury, sickness or disease' at a given point in time.

J.A. V at 1753 (emphasis supplied).

A member of the insurance industry committee responsible for preparing the policies at issue, stated: "Under the new policy, the timing device, or 'trigger', for coverage is clearly set forth as the time when the bodily injury or property damage occurs."[31]

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[31] Wendorff, *The New Standard Comprehensive General Liability Insurance Policy*, ABA Section of Insurance, Negligence and Compensation Law Proceedings 250,254 (1966). Mr. Wendorff was a member of the Joint Forms Committee of the insurance industry associations which drafted the policy language.

The same rule as to trigger of coverage (but not its application) was correctly stated by proposed *amicus* Walbrook Insurance, Ltd. in its brief in the court of appeals (at 18-19):

> Putting to one side for the moment other aspects of the 'bodily injury' definition, it is clear that such 'bodily injury' must occur during the policy period in order for there to be coverage. *There is no requirement that the accident or casual exposure take place during the policy period.* What is essential is the resulting 'bodily injury' during the policy period.

(emphasis added).

The insurance industry agreed in 1978 that injury, regardless of when exposure to harmful conditions or manifestation occurs, is the trigger of coverage under the insurance policy language in issue in this case:

> Presently the standard general liability policies provide coverage for injury which occurs during the policy period, regardless of when the exposure to harmful condition [sic] takes place, or when injury become [sic] known or manifest.

Minutes of March 28, 1978 Meeting of General Liability Rules and Forms Committee of Insurance Services Office. J.A. V at 1841. This statement provides direct support for the court of appeals holding.

The record further demonstrates that manifestation of injury as the sole trigger of coverage is not, as certain petitioners urge, the "traditional" rule.[32] Instead the manifestation theory specifically was rejected by the insurance company petitioners and their *amici* despite its present advocacy by three of the petitioners here. An Aetna draftsman of the insurance policies stated in a 1966 letter:

> It is surprising to me to hear of a current reference to the requirement that injury or damage must become manifested during the policy term in order to fit the

[32] As shown above, the petitioners' position that manifestation is the "traditional" rule is not correct legally either.

> definition of 'occurrence' under the new policies. Terminology such as this had actually been used in some previous drafts of our new policy but the final definition of occurrence speaks in terms of 'an accident, including injurious exposure to conditions, which results, during the policy period in bodily injury or property damage . . . '

J.A. IV at 1600.

Hartford's general counsel also confirmed that the manifestation trigger of coverage "was carefully studied by the [insurance] industry in 1961 and rejected . . . ." J.A. IV at 1552.

Moreover, the record supports the holding of the court of appeals that asbestos-related injury takes place, and thus triggers coverage, throughout the entire injurious process of inhalaton exposure, exposure in residence, and at manifestation. This holding is fully supported by the uniform testimony of the four expert medical witnesses in the district court. *E.g.*, J.A. VII at 2401, 2631, 2632-33, 2655, 2656-57, 2661; J.A. IX at 3335-36, 3386-87.

b. *Scope Of Coverage*

With respect to the "legal liability" coverage provided by the insurance policies at issue, the court of appeals held: "Once triggered, each policy covers Keene's liability." Slip op. at 17. The holding of the court of appeals is simply a restatement of the insuring clause of the petitioners' comprehensive general liability insurance policies which "provide[s] that the insurance company will pay on behalf of Keene '*all sums*' that Keene becomes *legally* obligated to pay as damages because of bodily injury during the policy period." Slip op. at 24 (emphasis added).

Furthermore, the record below demonstrates that many insurance companies acknowledged at a 1977 insurance industry meeting the "all sums" legal liability principle adopted by the court of appeals:

> The majority view was that the coverage existed for each carrier thoughout [sic] the period of time the asbestosis condition developed, *i.e.*, from the first

> exposure through the discovery and diagnosis. The majority also contended that each carrier on risk during any part of that period could be fully responsible for the cost of defense and loss. The majority relied on *Borel* v. *Fibreboard Paper Products Corporation*, 493 F.2d 1076, U.S. Court of Appeals, Fifth Circuit (applying Texas law).

American Insurance Association and American Mutual Insurance Alliance Memorandum, dated May 20, 1977. J.A. III at 987. Thus the court of appeals simply applied the principle acknowledged by the insurance companies in 1977 that their policies provide coverage for their policyholders' entire legal liability.[33]

The court of appeals also held that the insurance policies cover the policyholder's legal liability in full without proration of any damages or defense costs to the policyholder. Numerous examples in the record demonstrate that the impermissibility of prorating expenses to the policyholder has been recognized by the insurance companies. In 1964, for example, the insurance industry draftsmen of the standard policy language explained:

> [P]rorating cannot be effectuated between the insurer and the claimant. Between two insurers, of course, they would prorate.

Minutes of September 21-23, 1964 Joint Forms Committee of Mutual Insurance Rating Bureau (J.A. V at 1807).

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[33] The petitioning insurance companies misstate the reasonable expectations rule. That rule is an objective rule and not a subjective one. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 82 Harv.L.Rev. 961, 967 (1970). Even Keene's subjective reasonable expectations support the court of appeals' holding. Keene's Vice President of Finance, in charge of the insurance function, testified that his expectation was that *all* of Keene's liability would be covered under its comprehensive general liability insurance policies. J.A. Supp. at 3231A. Keene's initial complaint in this action alleged that the defendants each were liable to Keene for *all* of Keene's damages and defense costs (J.A. I at 16).

Liberty's "ordinary meaning" argument (at 16-17) overlooks the fact that comprehensive legal liability insurance completely covers a policyholder's legal liability.

Petitioner INA expressed the same concept internally in 1975:

> In the situations where there was no carrier in the earlier years, or the carrier cannot be identified, the insured should not be asked to contribute out of their [sic] own pocket . . . . [T]he fact of not requiring the insured to contribute is no different than [sic] any case that is settled for [sic] trial where there has been an exposure which is partly uninsured.

INA Memorandum, dated 8/8/75 (J.A. VIII at 3183).

Recently, the general counsel for petitioner Hartford, which espouses "pro rata exposure" here, stated in a sworn statement in a New York federal court:

> No serious argument can be made in favor of prorating coverage for multitudes of individual claimants over 10 to 20 years.

Affidavit and Attached Memorandum, dated July 1, 1980, of Richard A. Schmalz at 8 (filed in *Schering Corp.* v. *The Home Insurance Co.*, No. 79-C02817 (E.D.N.Y.), and referenced in Keene's Reply Brief, at 9, in the court of appeals.

The insurance contracts simply do not make any provision for a sharing of damages and costs between the policyholder on the one hand and its insurance companies on the other when one or more insurance policies are triggered by injury during the policy period. The policies *do* provide that the insurance companies may seek to allocate the costs among themselves pursuant to the "Other Insurance" clause which is a feature of the insurance contracts in issue. *E.g.*, J.A. II at 551. While the insurance companies may seek an allocation of damages from each other, permitting allocation to the policyholder would violate the insurance contract language and the rule which prohibits insurance companies from obtaining subrogation benefits from their policyholders.

There is not a shred of competent evidence in the record that the insurance industry, *ante litem motam*, sought to obtain proration from their policyholders in continuing injury cases.

To the contrary, as petitioner Liberty itself wrote in its brief below:

> Once a policy is triggered by the occurrence of the insured event, the insurer at that time is obligated to pay for *all damages* which have been occasioned and/or all future damages arising out of the wrongful acts.

At 55 (emphasis added).

These insurance company statements virtually compel the holding of the court of appeals. The decision of the court of appeals is correct and *certiorari* should be denied.

F. THE COURT BELOW PROPERLY GRANTED DECLARATORY RELIEF

Aetna alone challenges the propriety of declaratory relief. Not only is Aetna incorrect as a matter of law since the action below presented a justiciable case or controversy, but this procedural issue does not justify *certiorari*.[34]

The court of appeals found that "the interpretation of the contracts at issue . . . presents a 'real and substantial controversy' that can be specifically resolved by a decision in [the declaratory judgment action]" (slip op. at 9), and that no facts "in a particular tort suit . . . would be relevant to the determination of the policies' applicability to [the policyholder's] liability for asbestos-related injury" (*id.*)

The court of appeals' justiciability holding recently was followed in the Third Circuit. *ACandS, Inc.* v. *Aetna Casualty and Surety Co.*, Nos. 80-2659 and 2660 (3d Cir. Dec. 9, 1981). *Accord, American Motorists Insurance Co.* v. *Philip Carey Corp.*, No. 79 Civ. 0518 (S.D.N.Y. 1980).

Insurance coverage questions traditionally have been decided apart from the underlying claims. *See, e.g., Stevens Industries, Inc.* v. *Maryland Casualty Co.*, 391 F.2d 411 (5th Cir.), *cert. denied*, 392 U.S. 926 (1968); *Transamerica Insurance Co.* v. *Bellefonte Insurance Co.*, 490 F.Supp. 935 (E.D.

[34] "Justiciability" was not even raised in the *Forty-Eight* case.

Pa. 1980); *County of Wyoming, N.Y.* v. *Erie Lackawanna Railway Co.*, 360 F.Supp. 1212 (W.D.N.Y. 1973), *aff'd*, 518 F.2d 23 (2d Cir. 1975); *Bruce* v. *United States Fidelity & Guaranty Co.*, 277 F.Supp. 439 (D.S.C. 1967); *Friestad* v. *Travelers Ins. Co.*, 452 Pa. 416 (1973).

No other insurance company supports Aetna's challenge to the propriety of declaratory relief. It is not surprising that Aetna has lost the justiciability argument below, in the Third Circuit and in the state courts of Florida and Pennsylvania.[35]

CONCLUSION

For the foregoing reasons, the petitions for a writ of *certiorari* should be denied.

Respectfully submitted,

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[35] *Crown Cork & Seal, Inc.* v. *Aetna Casualty & Surety Co.*, No. 1292, Pennsylvania Court of Common Pleas, Sept. Term, 1978; *Celotex Corp.* v. *Aetna Casualty & Surety Co.*, Case 79-5885, Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

Supplemental Brief 2

Nos. 81-1012, 81-1197, 81-1298 and 81-1328

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ALEXANDER L. STEVAS,

IN THE

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INSURANCE COMPANY OF NORTH AMERICA,
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v.

KEENE CORPORATION,
Respondent.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

AETNA CASUALTY & SURETY COMPANY,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

LIBERTY MUTUAL INSURANCE COMPANY,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

On Petitions For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT KEENE CORPORATION

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Respondent.

On Petitions For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT KEENE CORPORATION

Respondent Keene Corporation ("Keene") submits this supplemental brief for the purpose of establishing the source and integrity of a quotation appearing on page 13 of its Brief in Opposition to the Petitions for Certiorari. Petitioner Hartford Accident & Indemnity Company ("Hartford") incorrectly

charges at page 5 of its Reply Memorandum that Keene "utterly fabricate[d]" the quotation. The quoted statement was, in fact, made by Hartford.

At page 13 of its Brief in Opposition, Keene quoted Hartford as follows:

> The burden of proof rule stated in *Keene, Forty-Eight* and *Porter* is exactly that espoused by Hartford. Hartford stated in its *amicus curiae* brief in *Forty-Eight*, that "an insurer which can demonstrate in any particular case that no bodily injury occurred during its policy period despite exposure to asbestos would not be liable" (at 5).

Keene referred to the same statement by Hartford in Keene's Opposition to Motions by Liberty Mutual Insurance Company and Insurance Company of North America to Defer Consideration which Keene filed with this Court on January 13, 1982 (at 6). Hartford did not question the quotation at that time.

Keene accurately quoted and correctly attributed the statement to Hartford. The quoted statement appeared at page 5 of Hartford's *amicus curiae* brief in *Forty-Eight* in the Sixth Circuit.* A copy of the cover page and page 5 of that brief is appended hereto.

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---

* That brief was filed by the same attorneys who filed Hartford's Reply Memorandum here.

APPENDIX

Nos. 78-1322/23/24/25/26

United States Court of Appeals
FOR THE SIXTH CIRCUIT

INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff-Appellant
Cross-Appellee,

v.

FORTY-EIGHT INSULATIONS, INC.,
AFFILIATED FM INSURANCE COMPANY,
ILLINOIS NATURAL INSURANCE COMPANY,
LIBERTY MUTUAL INSURANCE COMPANY,
Defendants-Appellees
Cross-Appellants,

TRAVELERS INDEMNITY OF RHODE ISLAND,
Defendant-Appellee.

BRIEF OF AMICUS CURIAE HARTFORD ACCIDENT AND INDEMNITY COMPANY

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* * *

As this analysis makes clear, the fundamental premise of the trial court's exposure approach is that bodily injury occurs, if at all, when a claimant is exposed to and inhales asbestos fibers. *See* 451 F. Supp. at 1239. The unspoken corollary of this injurious exposure theory is that where an insurer can demonstrate that injury did not occur despite exposure during its policy period, no indemnity would be owed. For example, if an insurer can prove that a given claimant wore an effective respirator which prevented him from inhaling asbestos fibers during the insurer's policy period despite exposure, then no indemnity would be owed by that insurer because no "bodily injury" would have occurred under its policy.

This Court should thus affirm the lower court's ruling that injurious exposure, not manifestation, triggers coverage under the general liability policies at issue in this case. In so doing, the Court should make explicit the trial court's implicit premise that exposure must cause bodily injury in order to activate coverage and that an insurer which can demonstrate in any particular case that no bodily injury occurred during its policy period despite exposure to asbestos would not be liable.

II. THE TRIAL CORRECTLY HELD THAT EACH PARTY IS LIABLE FOR A PROPORTIONATE SHARE OF INDEMNITY AND DEFENSE COSTS BASED ON INJURIOUS EXPOSURE TO ASBESTOS BUT THE PARTIES' LIABILITY IS NOT "JOINT AND SEVERAL."

After determining that injurious exposure to asbestos products triggers coverage, the trial court went on to decide . . .

* * *

Petitioner's Reply Brief

1

Nos. 81-1012, 81-1197, 81-1298 and 81-1299

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LIBERTY MUTUAL INSURANCE COMPANY, *Petitioner*,

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On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER AETNA CASUALTY AND SURETY COMPANY

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KEENE CORPORATION, *Respondent*.

REPLY BRIEF FOR PETITIONER AETNA CASUALTY AND SURETY COMPANY

In its Brief in Opposition, Keene presents and defends a version of the lower court's decision that bears virtually no relation to reality. It asserts that the D.C. Circuit's ruling only

"reflected the interpretation of state law in light of the facts, legal positions [of the parties] and relief requested" (Br. Opp. at 5), and on that basis contends that there is no real conflict between that ruling and those of other courts of appeals in *Forty-Eight* and *Porter* (*id.* at 9-12).

Judge Bazelon's opinion is a complete answer to this remarkable suggestion. The opinion emphasized that the court viewed the "only relevant facts" on asbestos-related disease as being "that the diseases develop long after exposure to Keene's products, and that Keene can be held liable for their occurrence." Pet. App. A at 3a-4a n.3. Indeed, the court criticized even Keene for what it characterized as an "unnecessarily fact-bound" approach to the case. *Id.* at 16a & n.19. The "legal positions" of the parties played, if possible, an even smaller role in the court of appeals' decision. Judge Bazelon noted that Keene had not raised the "exposure-in-residence aspect of its argument" in the district court, but emphasized that the court of appeals had "not rel[ied] . . . on any legal or factual aspect of Keene's argument." *Id.* at 22a n.25.

These portions of the opinion and its reasoning as a whole establish that the court of appeals' decision is subject to none of the limitations that Keene would now attach to it. It would be ironic indeed if "facts" and "legal positions" that the court of appeals expressly characterized as "irrelevant" and refused to rely upon could serve as the basis for denial of further review. In truth, the sole basis for the court of appeals' extreme ruling was the purely hypothetical "reasonable expectations" that it imputed to Keene, a point which receives just one oblique reference in a footnote in the Brief in Opposition (p. 21 n.33). It is precisely the unbounded nature of this concept and the court of appeals' unwillingness to restrict itself to a particular factual

context that makes this case particularly worthy of further review, both with respect to the Constitution's requirement of a "case or controversy" and the merits.

1. Keene Misportrays The "Case Or Controversy" Issue Presented By This Case

Keene evades the Article III problem in this case when it contends that "[i]nsurance coverage questions traditionally have been decided apart from the underlying claims." Br. Opp. at 23. The question is not whether an insurer's liability must be determined in the same suit as the tort plaintiff's claim, but whether the courts are free to determine a coverage dispute without referring to the specific factual context provided by one or more specified underlying claims. [1] It is that factual context, of course, that determines whether the liability is inside or outside the coverage provided by the insurance contract.

As Keene points out, the court of appeals' response to this problem was to deny that any facts concededly absent from the case were "relevant to the determination of the policies' applicability to Keene's liability for asbestos-related injury." Pet. App. A at 7a-8a; Br. Opp. at 23. However, this reasoning incorrectly confuses the propriety of a broad holding on the merits with the constitutional requirement of a "case or controversy." A court may not decide a case that would otherwise be impermissibly hypothetical simply because it is willing to fashion a broad holding that renders many facts irrelevant. The court of appeals' misunderstanding of this basic point, which

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[1] Cases cited by Keene illustrate the distinction. *See* Br. Opp. at 23-24. In *Transamerica Insurance Co.* v. *Bellefonte Insurance Co.*, 490 F.Supp. 935, 936 (D.D.C. 1980), a suit to determine the respective obligations of two liability insurers had been "inspired" by two specified tort suits. *County of Wyoming* v. *Erie Lackawanna Ry. Co.*, 360 F.Supp. 1212 (W.D.N.Y. 1973), *aff'd*, 518 F.2d 23 (2d Cir. 1975), involved insurance obligations arising out of a single accident at a railroad crossing. *See also* Petition at 13.

exemplified its disregard for traditional restraints on judicial action, is a strong reason for further review.

2. The Conflict Between The Circuits On The Issues Decided Below Is Both Real And Detrimental To The Fair Administration Of Justice

Keene suggests that there are only "superficial differences" between the rulings of the courts of appeals in *Keene*, *Forty-Eight* and *Porter*. Br. Opp. at 12. This general characterization, and each of the subsidiary "distinctions" between these cases that Keene advances, are without merit.

Keene suggests, for instance, that the court below merely followed the Fifth and Sixth Circuits in "construfing] . . . ambiguities [in operative policy language] in favor of the position advanced by the policyholder." Br. Opp. at 12. However, Judge Bazelon's opinion made it clear that the court found it unnecessary to rely on this interpretive device, since "principles embodied in the insurance policies provide[d] a sufficient basis" for decision. Pet. App. A, at 10a-11a. "Reasonable expectations" imputed to Keene were in turn the "guide" to these principles, and the court did not rely on "the position advanced by" Keene or "on any legal or factual aspect of Keene's argument." *Id.* at 11a, 22a n.25.[2] Likewise, what Keene describes inaccurately as "substantial documentation of insurance industry conduct and insurance policy interpretation" and the "medical record" (Br. Opp. at 11) furnished no basis for distinction, since the court below considered the factual record equally irrelevant. *See* p. 2, *supra*.

---

[2] There is particular irony in Keene's suggestion that *Forty-Eight* and *Porter* are distinguishable because the matter of "exposure in residence until manifestation *was not* addressed by the parties. . . ." Br. Opp. at 10. In this case, the court of appeals found that Keene had also failed to raise that question below. Pet. App. A at 22a n.25.

Finally, any fair reading of *Forty-Eight, Porter,* and *Keene* rebuts the suggestion that the conflict in their holdings is mitigated by limitations on the issues that were in a technical sense "before" these particular courts. Parties and lower courts must consult the reasoning and holdings of *Porter, Forty-Eight, Eagle-Picher* and *Keene* when they act. The conflict between these decisions on this level is fundamental, not "superficial." Contrary to Keene's suggestion, they can not possibly be formed into any intelligible rule governing all future cases.

Keene's facile attempt to downplay the importance of this conflict by suggesting that "[u]nderlying cases will continue to be filed, dismissed, settled or tried" (Br. Opp. at 8) misses the point. It is as true in an asbestos suit as any other litigation that each case will ultimately follow one of these avenues. The point remains that the existing conflict between the Fifth, Sixth and D.C. Circuits on a critical aspect of asbestos litigation will vastly complicate settlements and trials in such cases, thereby imposing additional costs on insurers, insureds, courts and inevitably on claimants. Keene has not disputed the recurrent nature of the issues resolved below, their importance or the burden that asbestos litigation has imposed and will impose on federal and state courts.

3. Keene's Arguments Concerning The Correctness Of The Lower Court's Decision Do Not Support Denial Of The Writ

Keene strives mightily to show through a handful of misleading quotations from isolated documents that the decision below was "firmly supported by the ample factual record in this case." Br. Opp. at 17-23. This argument totally ignores the procedural posture of this case and has nothing to do with the propriety of further review by this Court.

The court of appeals directed the entry of partial summary judgment in Keene's favor. In so doing, it placed absolutely no reliance on the excerpts from documents quoted in Keene's

brief, because the *ratio decidendi* for its decision rendered all such facts immaterial. The court was concerned only with "expectations" that Keene "could have" formed on the basis of the policy language (Pet. App. A at 11a n.12), not with what Keene or any other party actually understood the coverage to be.

The validity of this circular approach and of the court's specific holdings is the issue properly presented at this juncture, and it could and should be resolved without reference to the excerpts quoted in Keene's brief. Neither lower court relied on those documents, and it is inconceivable that such selected excerpts would discharge Keene's burden following summary judgment, which is to show the absence of any material dispute in the documents in the record. For these reasons, the factual materials quoted by Keene would not bear on the issues properly before this Court, and they are equally immaterial to the question whether review is appropriate. Even if Keene's snippets of evidence are to be relevant to the issues in this case, they should be addressed in the lower courts after the proper legal standards have been clarified here, and not in this Court on the basis of unelaborated quotations in a Brief in Opposition. [3]

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[3] The premise of Keene's argument — that what it characterizes as statements by the "insurance industry," "insurance companies" and "insurance industry draftsmen" (Br. Opp. at 17-21) are material and conclusive of the issues in the case — is intended to obscure the many evidentiary issues that did not figure in the decision of either lower court. They include as to each piece of evidence (1) whether such 'extrinsic evidence" should be considered when the policies are interpreted, (2) whether statements by the specific individuals quoted could be used against one or more of the defendants, (3) whether the quoted materials viewed in a proper context establish anything resembling what Keene suggests, and (4) whether other materials in the record outweigh any probative value they possess. Keene's quotations do not clear these hurdles, let alone "compel the holding of the court of appeals." (Br. Opp. at 23).

Keene's "legal" defense of the court of appeals' judgment (Br. Opp. at 13-16) is most noteworthy for its abandonment of the stated basis for that court's decision. *See* Br. Opp. at 21 n.33.[4] Rather than addressing the reasoning of the lower court's decision, Keene argues that the decision "simply restates the policy language and follows analogous cases that have applied state law." Br. Opp. at 13. This argument, like so many others in the Brief in Opposition, stands in stark contrast to Judge Bazelon's opinion. The court said of the sources on which Keene's contention is based, "Neither the case law nor the terms of the policies lead us directly to a resolution of the coverage issues raised in this case." Pet. App. A at 9a (footnote omitted).[5]

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[4] Keene's complaint (Br. Opp. at 21 n.33) that the petitioners have, by pointing out the injustice of interpreting insurance policies by attributing objective "reasonable expectations" to insureds that contradict even their own litigating positions (*see, e.g.*, Aetna Pet. at 21-23), wrongly cast that "rule" as a "subjective" test is both wrong and unresponsive. With respect to the issue whether the "expectations" imputed to Keene were supported by the record, the very best that the Brief in Opposition can muster is the following deposition testimony by one of Keene's executives (JA Supp. at 3231A):

> Q. Are you familiar with the comp liability policies written during the period 1948 through 1959?
>
> A. By their definition of being comprehensive, they should cover all liability that Keene got involved in.
>
> Q. Have you ever read a policy, sir?
>
> A. I don't have a copy of the policy.

This underscores the absence of support for the lower court's ruling and the leeway its novel doctrine allows courts.

[5] None of the cases mentioned by Keene would support the result reached by the court below (even if it had chosen to rely on them), but one is instructive for present purposes. In *Emons Industries, Inc.* v. *Liberty Mutual Fire Ins. Co.*, 481 F.Supp. 1022 (S.D.N.Y. 1979), the court held that insurers on the risk between the time that pregnant women had ingested DES and ensuing cancers manifested themselves should prorate the costs of

Keene's desperate attempt to portray the decision of the court below as something it is not underscores the reasons for granting the writ set out in the petitions in these related cases. This decision raises straightforward legal issues, uncomplicated by factual issues that would be inappropriate for this Court's consideration. The action of the lower court both disregarded Article III limitations and created a conflict among the Circuits of critical importance in a burgeoning area of litigation. These issues warrant this Court's attention.

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defense, because disputed facts remained regarding when the "bodily injury" had occurred. *Id.* at 1026-27, 1028. Indeed, the court rejected an attempt by Keene itself (acting as an *amicus*) to procure a decision on "whether 'manifestation' or 'exposure' should govern an insurer's ultimate liability to an insured," stating that it would "decline [Keene's] invitation to render an advisory opinion." *Id.* at 1028. The holding and reasoning of the *Emons* decision contrasts vividly with the unrestrained action of the court below, and Keene's role in that suit gives the lie to its persistent suggestion that the conflict between "exposure" and "manifestation" approaches to asbestos cases is a "specious controversy" created by insurance companies. *See* Br. Opp. at 3.

CONCLUSION

For the reasons set out in Aetna's petition and hereinabove, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Petitioner's Reply Brief

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No. 81-1012

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

REPLY OF PETITIONER INSURANCE COMPANY OF NORTH AMERICA TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1012

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

REPLY OF PETITIONER INSURANCE COMPANY OF NORTH AMERICA TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The briefs in opposition filed by respondent Keene Corporation ("Keene") and amici curiae Armstrong World Industries, Inc., et al. ("Armstrong") do not even attempt to defend the District of Columbia Circuit's decision on its own grounds. Studiously avoiding any mention of the court of appeals' extraordinary *sua sponte* effort to fix up its decision by its Order of December 21, 1981,[1] Keene and Armstrong seek to salvage the decision's bottom line result with *post hoc* factual and legal arguments that formed no basis for the court's decision, are contradicted by the December 21 Order, and are, in any event, both irrelevant and misleading. In this respect, the briefs in

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[1] *See* INA's Supplemental Brief, January 11, 1982.

opposition are similar to the court's own "fix-up" Order of December 21. Like it, they serve merely to underscore the *Keene* decision's lack of a principled approach, the unnecessary and disruptive conflict it has produced, and the consequent need for this Court to exercise its supervisory jurisdiction.

1. The Keene and Armstrong briefs do not dispute that a conflict between circuits as to questions controlled by state law can present a certworthy issue if the conflict is not merely corollary to a permissible difference of opinion in state courts. Keene Opp. at 6; Armstrong Opp. at 18. *See Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938).

2. Both briefs seek to avoid the impact of *Ruhlin* by denying that a conflict exists. They claim that *Keene* rests on factual and legal predicates different from those that formed the basis for the decisions in *Forty-Eight*, *Porter*, and *Eagle-Picher*. These claims are not true.

a. Both the Keene and Armstrong briefs rely on isolated excerpts from documents obtained during discovery in *Keene*[2] and contend that these documents demonstrate that the District of Columbia Circuit proceeded from a different set of facts than did the courts in *Forty-Eight*, *Porter*, and *Eagle-Picher*. Keene Opp. at 17-23; Armstrong Opp. at 12-15. That contention is plainly wrong.

Not one of the documents quoted by Keene and Armstrong was considered or relied on by the courts below. Indeed, in an Order dated July 8, 1980, the district court

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[2] The Armstrong brief also quotes from documents it claims were produced in other cases. (Armstrong Opp. at 15-18.) This tactic has, of course, been criticized previously by this Court. *E.g.*, *Lawn v. United States*, 355 U.S. 339, 354 (1958) (striking non-record evidence submitted by the Government and portions of Government brief dealing with it), *citing McClellan v. Carland*, 217 U.S. 268, 282-83 (1910); *South Carolina v. Wesley*, 155 U.S. 542, 544 (1895) (precluding references to a transcript of the record in a case pending in another court).

specifically ruled that the issues that Keene and Armstrong seek to resurrect before this Court "have no bearing on [the] resolution" of this dispute.[3] No reference is made to or any reliance placed upon any of the documents cited by Keene and Armstrong in either the district court's January 30, 1981, Memorandum Opinion,[4] the Court of Appeals' October 1, 1981 Opinion,[5] or even the Court of Appeals' fix-up Order of December 21, 1981.[6]

In short, the conflict between *Keene* on the one hand and *Forty-Eight*, *Porter*, and *Eagle-Picher* on the other cannot be explained away on the basis of the *Keene* factual record. As the opinions themselves amply demonstrate, each court applied the same law to the same insurance contracts in virtually identical factual contexts and arrived at radically different results.

b. Similarly unfounded is the assertion that the legal conclusions of the *Keene* decision were somehow "built upon" those in *Forty-Eight*, *Porter*, and *Eagle-Picher* so as to constitute a natural "evolution" of the processes set in motion by the earlier decisions. Armstrong Opp. at 7, 9. The October 1, 1981 Opinion of the District of Columbia Circuit could not have been more explicit in its rejection of *Forty-Eight* and *Porter*, peremptorily asserting that the court "decline[d] to adopt the approach taken" in those cases. Appendix A to INA's Petition, at 14a n.16. And, in its December 21, 1981 fix-up Order, the court acknowledged, albeit belatedly, that it had also declined to adopt the manifestation approach of *Eagle-Picher*. Appendix to INA's Supplemental Brief. The "evolutionary" character of the *Keene* opinion is, in sum, a figment of a brief writer's fertile imagination.

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[3] The district court Order is attached hereto as an Appendix.

[4] Appendix B to INA's Petition.

[5] Appendix A to INA's Petition.

[6] Appendix to INA's Supplemental Brief.

c. Just as clearly wrong are the claims that the *Keene* decision differs from *Forty-Eight*, *Porter*, and *Eagle Picher* because of Keene's legal arguments, and that the decision "adopted the position presented by Keene in the district court and the court of appeals." Keene Opp. at 4. This claim is flatly contradicted by the court's own acknowledgement that it did not "rely . . . on any legal or factual aspect of Keene's argument . . . ." [7]

3. Having failed to reconcile the District of Columbia Circuit's decision with those of the other federal courts, Keene argues, in essence, that the conflict makes no difference to the administration of justice and that the *Keene* decision, in any event, "follows analogous cases that have applied state law." Keene Opp. at 8, 13. These arguments also lack merit:

a. INA's Petition for Certiorari (at 9) describes in some detail the vise in which INA and other insurers find themselves as a result of the conflicting decisions that the federal courts have rendered. Keene's response—that "cases will continue to be filed, dismissed, settled or tried" (Keene Opp. at 8)—amounts to no more than a cavalier pronouncement that life can go on whatever the adversity. The simple fact is that if these conflicting decisions remain in place they will result in the imposition of un-

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[7] Order, December 21, 1981. Appendix to INA's Supplemental Brief.

In addition to the arguments about a more complete factual and legal record, Keene also cites *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, No. 81-2129 (E.D. Pa. Dec. 4, 1981), as support for its assertion that there is no conflict among *Keene*, *Forty-Eight*, *Porter*, and *Eagle-Picher*. But the court in *Pittsburgh Corning* concluded that the policy before it did not require, as the policies in *Keene*, *Forty-Eight*, *Porter*, and *Eagle-Picher* did, that bodily injury "occur" in the policy period for there to be coverage. This difference was explicitly noted by the court (at note 23 of its Opinion), which did not address the most important issue in *Keene*, *Forty-Eight*, *Porter*, and *Eagle Picher*: when does bodily injury occur in the context of asbestos-related diseases?

warranted and unnecessary confusion upon claimants, manufacturers, insurers, and reviewing courts alike.

The conflict among the courts of appeals will, in addition, produce an uncontrollable wave of forum shopping and a strong incentive for filing subsequent suits in federal rather than state courts. Those parties wanting the benefit of the *Keene* rule will seek to file their diversity actions in the District of Columbia Circuit; those who would benefit from the *Forty-Eight-Porter* approach will file in the Sixth or Fifth Circuits; and those favored by *Eagle-Picher* will file in the First Circuit.

In the ordinary diversity situation parties are discouraged from forum shopping by choice of law rules designed specifically for that purpose. The conflicting decisions reached in *Keene*, *Forty-Eight*, *Porter*, and *Eagle-Picher*, applying the same law to the same facts and producing different results, defeat those choice of law rules. By so doing, they distort the judicial process by making the result of litigation depend upon the circuit in which a case is filed.

b. Keene's contention that the decision below should be left alone because it correctly applies applicable state law (Keene Opp. at 13) is both misdirected and erroneous.

It is misdirected because, even assuming hypothetically that *Keene* were correctly decided, the existing conflict between it and *Forty-Eight*, *Porter* and *Eagle-Picher* is untenable for the reasons that have already been discussed. It is erroneous because none of the state cases cited by Keene (Keene Opp. at 14-16) even remotely supports the result reached by the District of Columbia Circuit.[8]

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[8] Indeed, in one of Keene's cases, *Emons Industries, Inc. v. Liberty Mut. Fire Ins. Co.*, 481 F. Supp. 1022 (S.D.N.Y. 1979), Keene itself submitted an amicus brief requesting that the court determine "the question of whether 'manifestation' or 'exposure' should govern an insurer's ultimate liability to an insured." Not-

4. The lack of justification for the result below, and the need for this Court's supervision, are further shown

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withstanding Keene's request, the court explicitly refused to decide that question. *Id.* at 1028.

In another, *American Motorists Ins. Co. v. E.R. Squibb & Sons, Inc.*, 406 N.Y.S.2d 658 (Sup. Ct. 1978), a case involving injury resulting years after the ingestion of DES, the court adopted the manifestation theory and rejected the exposure approach. *Schultheis v. Centennial Ins. Co.*, 108 Misc. 2d 725, 438 N.Y.S. 2d 687 (Sup. Ct. 1981), cited by Keene in an effort to discredit *American Motorists*, is only concerned with when an injury is discovered, not, as in the instant case, when it occurs.

In *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, *cert. denied*, 449 U.S. 912 (1980), which also involved harm resulting from the ingestion of DES, it was impossible to determine which defendant was liable. The court held that, in these extraordinary circumstances, so long as the plaintiff sued companies representing a "substantial share" of the total market, she could recover from all defendants under California law, subject to any defendant's right to avoid liability by proving it was not responsible for the harm. Thus, while the case bears a similarity to *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (discussed in INA's Petition at 4), it provides no support for the court of appeals' unprecedented theory of insurance coverage in the instant case.

The other cases cited by Keene are similarly inapposite. The *Tenneco Chemical* cases upon which Keene relies (Opp. at 14 and n.26) involved only the scope of the insurers' duty to defend. *Transameria Ins. Co. v. Bellefonte Ins. Co.*, 490 F. Supp. 935 (E.D. Pa. 1980), involved two separate torts for which two different insurers were liable. *Harmon v. American Casualty Co.*, 155 F. Supp. 612 (S.D. Cal. 1957), held only that an insurer was liable for events that occurred and were manifested within the coverage period, even though the full amount of the damages was not ascertainable until after the policy expiration date. *Snapp v. State Farm Fire & Casualty Co.*, 207 Cal. App. 2d 827, 24 Cal. Rptr. 44 (1962), *Gruol Constr. Co. v. INA*, 11 Wash. App. 632, 524 P.2d 427 (1974), and *American Mut. Liab. Ins. Co. v. Agricola Furnace Co.*, 236 Ala. 535, 183 So. 677 (1938), each involved injurious events that occurred over a time period covered by several insurers. Unlike the present action, under any theory of liability all the insurers were liable.

by other specious arguments that are advanced in an effort to avoid review:

a. Keene's argument that the Court is being asked to "federalize state insurance coverage questions" (Keene Opp. at 7-9) is completely wide of the mark.

As INA's Petition for Certiorari clearly states (at 11), what the Court is confronted with is a conflict among federal circuits brought about by the disregard of their *Erie* obligations. It is this departure from the accepted and usual course of judicial proceedings and the resulting conflict that it has produced that are the bases upon which this Court is being requested to exercise its certiorari jurisdiction. These are the traditional grounds for the exercise of certiorari jurisdiction as set forth in Rule 17 of the Court's Rules.

b. Keene's bald assertion that the circuit court's "burden of proof holding is correct" (Opp. at 12-13) is flagrantly in error. Keene provides no support for that assertion.[9] Furthermore, Keene's discussion of the duty to defend is wholly beside the point. While the duty to defend may turn on the existence of adequate allegations in the complaint, the duty to indemnify clearly does not. And, in the case of the duty to indemnify, the law is clear that the burden is on the insured to show that there was coverage.

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[9] As Liberty Mutual Insurance Co. demonstrates in its Petition (No. 81-1328 at 14-15 and nn. 14-21) there is no support for such a proposition because the law is to the contrary. Keene's error is compounded by its next assertion that "the decision does not deviate from *Erie Railroad Co. v. Tompkins*." Opp. at 12. Keene's support for that assertion—this Court's denials of certiorari in *Forty-Eight* (No. 81-198) and *Porter* (No. 81-200)—is completely inadequate. As this Court has repeatedly made clear, denials of certiorari do not have precedential significance. *E.g., United States v. Carver*, 260 U.S. 482, 490 (1923). The state case that Keene also cites, *Sindell*, *supra* at note 8, applying state law to determine tort liability, is simply irrelevant.

CONCLUSION

For the reasons set forth in INA's Petition for Certiorari, its Supplemental Brief, and this Reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1011

KEENE CORPORATION,

Plaintiff

v.

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,

Defendants

Filed Jul. 8, 1980

ORDER

This matter is currently before the Court on plaintiff's motion for partial summary judgment and defendants' oppositions thereto. At the hearing in this matter on June 26, 1980, several defendants indicated that the Court needed to hear medical testimony in order to resolve the defense and indemnification questions in this lawsuit. Although additional issues were raised at the hearing and in the parties' opposing papers, the Court concludes that some of these issues have no bearing on resolution of the instant motion. Accordingly, in an effort to narrow the scope of this action and to place it in a posture for final decision, the Court will consider only the following:

1. The terms of the relevant insurance policies, with the exception of defendant Pennsylvania Manufacturers Association.

2. Interpretation of the phrase "bodily injury caused by an occurrence" within the meaning of the policies and aided by competent medical testimony.

It is by the Court, this 8th day of July 1980,

ORDERED that medical testimony shall be taken at a hearing on July 28 and 29, 1980 at 10:00 a.m.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

Amicus Brief

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MOTION FILED
DEC 31 1981

No. 81-1012
IN THE

Supreme Court of the United States

October Term, 1981

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

vs.

KEENE CORPORATION,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

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No. 81-1012

IN THE

Supreme Court of the United States

October Term, 1981

INSURANCE COMPANY OF NORTH AMERICA,

Petitioner,

vs.

KEENE CORPORATION,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

American Home Assurance Company, National Union Fire Insurance Company of Pittsburgh, Pa., Granite State Insurance Company, AIU Insurance Company, The Insurance Company of the State of Pennsylvania, New Hampshire Insurance Company and Lexington Insurance Company hereby request to file the attached Brief Amicus Curiae regarding the Petition for Certiorari based upon the following:

1. Amici are insurance companies who have, at varying times, issued excess general liability policies to various manufacturers of products containing asbestos.

2. Amici have been sued by their insureds and other insurers in the following cases presently pending in the State Courts of California:

(a) *G.A.F. Corporation v. Insurance Company of North America, et al.* (No. C 286217) (Los Angeles County)

(b) *Armstrong Cork Company v. Aetna Casualty and Surety Company* (No. C 351357) (Los Angeles County)

(c) *Fireman's Fund Insurance Company v. Fibreboard Corporation, et al.* (No. 753885) (San Francisco County)

(d) *Johns-Manville Corporation, et al. v. The Home Insurance Company, et al.* (No. 765226) (San Francisco County).

3. In each of these cases the insured has *inter alia* sought a judicial declaration regarding the proper construction of certain terms of the respective policies. Specifically, the cases to a large extent turn on which coverage theory the California Courts will adopt in construing the term "occurrence" in these policies.

4. All four of these cases have recently been coordinated for all purposes before a single state judge pursuant to the California Rules of Court (designated as "Coordination Proceeding No. 1072"). The cases are presently in varying stages of pre-trial discovery.

5. In each case, amici have urged that the exposure theory of coverage is the correct construction of their respective policies under applicable state law.

6. The consent of the attorneys for one or more parties has been requested but not obtained.

7. Amici believe that review by this Court is warranted and the Court of Appeals' decision should be summarily reversed and remanded with instructions to affirm the Dis-

trict Court's opinion. The decision of this Court may have a significant impact on the course of the litigation in California in which they are parties.

Respectfully submitted,

LYNBERG & NELSEN,
NORMAN J. WATKINS,
CHARLES A. LYNBERG,
JEFF CARLISLE,
By NORMAN J. WATKINS,
Counsel for Amici.

No. 81-1012
IN THE

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INSURANCE COMPANY OF NORTH AMERICA,

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vs.

KEENE CORPORATION,

Respondent.

AMICUS CURIAE BRIEF.

Amici American Home Assurance Company, National Union Fire Insurance Company of Pittsburgh, Pa., Granite State Insurance Company, AIU Insurance Company, The Insurance Company of the State of Pennsylvania, New Hampshire Insurance Company and Lexington Insurance Company respectfully urge that this Court grant certiorari in this case, summarily reverse the Court of Appeals' decision and remand the case with instructions to affirm the District Court opinion.

REASONS WHY THE WRIT SHOULD BE GRANTED, THE COURT OF APPEALS' DECISION SUMMARILY REVERSED AND THE MATTER REMANDED WITH INSTRUCTIONS TO AFFIRM THE DISTRICT COURT OPINION.

1. The Court of Appeals' Decision Regarding the Application of Insurance Coverage to Asbestos-Related Claims Directly Conflicts With Decisions of the Sixth and Fifth Circuits and Seriously Impairs the Efficient Administration of Justice.

This Court recently denied certiorari in the related cases *Insurance Company of North America v. Forty-Eight In-*

sulations, 633 F.2d 1212 (Sixth Cir. 1980), *cert. denied*, 50 U.S.L.W. 3466 (1981) and *Porter v. American Optical Corp.*, 641 F.2d 1128 (Fifth Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (1981). The issue before the Sixth and Fifth Circuits is the identical issue before this Court: when is insurance coverage triggered for the liability of the insured in regard to asbestos-related claims. The Sixth and Fifth Circuits determined that the period of the claimant's exposure to the asbestos product will trigger the application of insurance coverage for the asbestos-related claim. This decision was based upon the interpretation of policy language considering the medical evidence regarding the etiology of asbestos-related diseases and well-regarded and uniform principles of state law.

The District Court in this case was presented with the same policy language as the Sixth Circuit and determined on a motion for partial summary judgment that insurance coverage is triggered when an injured claimant is exposed to asbestos products (513 F.Supp. 47, 51). The District Court specifically adopted the reasoning of the Sixth Circuit in reaching its decision.

The Court of Appeals, by Judge Bazelon, rejected the decision of the District Court and determined that coverage is triggered by the period from the claimant's first exposure through and including the date of manifestation (App. A, p.17). (The Circuit Court opinion is not yet reported and appears as Appendix A to Petitioner INA's Petition. We will refer to that Appendix and page number when referring to the Circuit Court opinion.) It appears that the primary rationale for the Court of Appeals' decision is that the insurance policies have a dominant purpose of indemnity and the court's objective is to give effect to that purpose (for instance, App. A, p.7). The Court of Appeals was guided by no particular state law but by basic principles governing

the interpretation of insurance policies (App. A, footnote 10).

The decision of the Court of Appeals creates a clear conflict between the Circuits regarding the trigger of insurance coverage for asbestos-related claims. The Sixth and Fifth Circuits reached their decision based on the same principles of contract construction that were utilized by the District Court in the instant case. The District Court after hearing all the evidence agreed with the Sixth Circuit. The Court of Appeals disagreed.

The resolution of this conflict is essential. The number of asbestos-related claims has reached the tens of thousands. Most of these claims are brought simultaneously against many manufacturers, including Keene and Forty-Eight Insulations. If the conflict between the Circuits is not resolved, then defendants in the same lawsuit will be handling the claim in different ways. Given the scope of the asbestos-related injury problem in this country, the Court's decision here will have far-reaching implications for the efficient handling of those asbestos-related claims. This Court should accept certiorari to resolve this conflict and thereby resolve this potentially drastic situation. *Aldinger v. Howard*, 427 U.S. 1 (1976).

Not only does this conflict between the Circuits create a harmful situation for claimants who will be faced with an inconsistent system for handling the claim, but the courts throughout the country will certainly suffer from this confusing situation. Administration of asbestos claims under the present conflicting rules will not commence until a determination is made regarding the applicable state law, the coverage trigger for each of the manufacturers involved, the choice of insurer to defend the claims and any other number of factors. The inevitable result will be to slow down the handling of these claims and clog the courts throughout the

country. This Court should accept certiorari to resolve the conflict and thereby avoid this troublesome problem for the administration of justice. *Linkletter v. Walker*, 381 U.S. 618 (1965).

2. The Court of Appeals' Decision Is Clearly Wrong and Does Not Constitute a Reasonable or Permissible Result.

This Court may accept certiorari on matters involving state law where the decision of the Court of Appeals is unreasonable. *Propper v. Clark*, 337 U.S. 472 (1949). The District Court in the instant case reached a reasonable decision consistent with other federal appellate courts which have examined the question.

The Court of Appeals rejected the arguments of all parties and the District Court. That decision is clearly erroneous for a number of reasons.

First, the Court of Appeals concluded that the insurance policy be interpreted based upon the reasonable expectations of Keene when it purchased the policy (App. A, p.8). It is suggested that this guideline is appropriate because an insurance policy is a contract of adhesion (App. A, footnote 12). The Court of Appeals' conclusion is unfounded.

Under applicable state law, all insurance policies are *not* contracts of adhesion (*e.g.* — Pennsylvania law — *Brokers Title Co., Inc. v. St. Paul Fire & Marine Insurance Co.*, 610 F.2d 1174 (3d Cir. 1979)). New York law holds that construction of insurance policies does not differ from other contracts where the contract is freely negotiated. *Skandia America Reinsurance Corp. v. Schenck*, 441 F.Supp. 715 (S.D.N.Y. 1977). The Court of Appeals apparently assumed that all insurance policies are contracts of adhesion. No further support was given for this assumption. It is more likely that these insurance policies were freely negotiated

by sophisticated business people and are not contracts of adhesion. Therefore, the underlying premise of the Court of Appeals' decision is wrong.

Second, the Court of Appeals appears to reject the notion that its decision is based upon ambiguous terms in the insurance policy being resolved in favor of the insured (App. A, p.8). Even if we assume that some ambiguity exists and the Court of Appeals resolved this matter in some part by construing the ambiguous language in favor of the insured, the Court of Appeals has gone too far in concluding that Keene in purchasing insurance was relieved of all liabilities relating to asbestos-related claims. (App. A, p.14). This conclusion is in no way reasonably related to the uniform policy language which defines "occurrence" as " 'an accident including injurious exposure to conditions, which results, during the policy period, in bodily injury . . .' " (App. A, p.2). Somehow the Court of Appeals has construed this language to mean that any policy in effect from the time of the claimant's first exposure to asbestos through manifestation of disease is fully liable for the claim. It has ignored the relationship between the occurrence and the bodily injury and the requirement that the bodily injury happen during the policy period.

State law recognizes that courts will not coerce a construction of a policy that fastens upon an insurer liability, which by the terms of the policy the insurer has not assumed. *Brezan v. Prudential Insurance Co. of America*, 507 F.Supp. 962 (E.D. Pa. 1981). Similarly, an insured is not free to expect that because he has an insurance policy, he is protected against all risks. *Taylor v. Phoenix Mutual Life Insurance Co.*, 453 F.Supp. 372 (E.D. Pa. 1978).

The Court of Appeals has fashioned a decision which ignores relevant state law and grossly distorts the reasonable and ordinary meaning of the insurance policies. On the other

hand, the District Court based its decision on well-established principles of state law, review of the medical evidence, and consideration of applicable precedent. These circumstances warrant this Court to grant certiorari, summarily reverse the Court of Appeals' decision, and remand the case with instructions to affirm the District Court opinion.

CONCLUSION.

Based upon the foregoing arguments and authorities, amici respectfully request that this Court grant certiorari, summarily reverse the decision of the Court of Appeals, and thereafter remand the case to the Court of Appeals with instructions to affirm the opinion of the District Court.

Respectfully submitted,

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No. 81-1012

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

vs.

KEENE CORPORATION,
Respondent.

CERTIFICATE OF SERVICE

I, Charles A. Lynberg, a member of the Bar of this Court and one of the Attorneys for Amici Curiae American Home Assurance Company, et al., hereby certify that I have this 30th day of December, 1981, served the accompanying brief for Amici on all parties to this proceeding by causing three (3) copies thereof to be mailed, properly addressed and with first-class postage prepaid, to the following:

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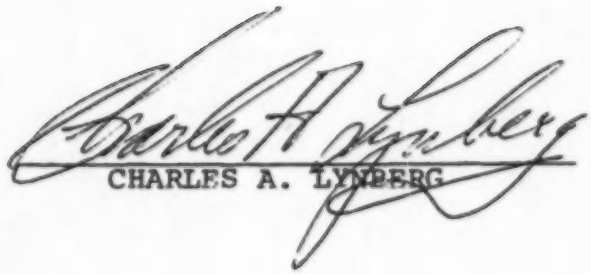

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Amicus Brief

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AETNA CASUALTY & SURETY COMPANY,
Petitioner,
v.
KEENE CORPORATION,
Respondent.

LIBERTY MUTUAL INSURANCE COMPANY,
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Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* ARMSTRONG WORLD INDUSTRIES, INC., ET AL.

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IN THE

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION OF ARMSTRONG WORLD INDUSTRIES, INC., ET AL., FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 36.1, the following companies move for leave to file the included brief as *amici curiae* in opposition to the petitions for a writ of *certiorari*: Armstrong World Industries, Inc.; Fibreboard Corporation; ACandS, Inc.; Asten Group, Inc.; Brand Insulations, Inc.; Brinco Mining Limited; The Celotex Corporation; Crown Cork & Seal Company, Inc.; and Standard Insulations, Inc. Certain of the parties have refused to give written consent to the filing of this brief.

All but one of Amici at some time in the past manufactured, sold, installed or distributed products containing asbestos. Brinco Mining Limited was a miner of raw asbestos. In recent years, each of the Amici has been confronted with increasingly large numbers of lawsuits filed by persons alleged to have been injured as a result of contact with asbestos or asbestos-containing products.

Amici have a significant interest in the coverage provided under general liability insurance policies for claims for asbestos-related injuries. All but one of Amici are presently engaged in litigation with their respective carriers in various jurisdictions throughout the United States and Canada, as set forth in Attachment A to the included brief, in an effort to establish their insurers' obligations to cover these claims. Through their extensive involvement with other suits, Amici have a perspective on the present case that is not shared by the parties and that has not yet been presented in the papers filed with the Court.

Because the present case concerns the issue of coverage for asbestos-related claims under policy language that is similar or identical to that found in many of the policies of Amici, Amici have an important interest in the subject matter of this suit. All of Amici submitted briefs outlining their views to the United States Court of Appeals for the District of Columbia Circuit in this action. All of Amici also filed with this Court a brief in opposition to petitions for *certiorari* in *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc.*, No. 81-198, *cert.*

denied, 50 U.S.L.W. 3466 (Dec. 8, 1981), *petition for reh'g filed* (Dec. 30, 1981), and *Liberty Mutual Insurance Co.* v. *Forty-Eight Insulations, Inc.*, No. 81-198, *cert. denied*, 50 U.S.L.W. 3466 (Dec. 8, 1981). In the included brief, Amici address the question whether the decision below presents any basis for the exercise of the Court's *certiorari* jurisdiction.

Because of Amici's substantial interest in the subject matter of the case and their ability to address points that should, but have not fully, been brought to the Court's attention, it is respectfully requested that leave be granted to file the attached brief.

Dated: February 12, 1982

Respectfully submitted,

/s/ Robert N. Sayler
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Armstrong World Industries, Inc.,
et al.

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF *AMICI CURIAE* ARMSTRONG WORLD INDUSTRIES, INC., ET AL.

INTEREST OF *AMICI CURIAE* AND BACKGROUND OF THE CASE

The petitions for *certiorari* refer to the pendency of other cases involving the question of insurance coverage for asbestos-related claims. All but one of Amici are parties to such litigation.[1] These suits involve issues similar, though not necessarily identical, to those raised in the case below, *Keene Corp.* v. *Insurance Co. of North America*, Nos. 81-1179-81, (D.C. Cir. Oct. 1, 1981, *modified* Dec. 21, 1981) ("*Keene*"). Generally, they involve questions concerning an insurance company's duties to defend and pay for all liability of its insured for asbestos-related claims under the language of its policies, including the language that was the focus of the decision in *Keene*.

These suits have arisen because Amici, like Keene Corporation, have been named as defendants in numerous lawsuits in which the claimants seek damages for bodily injuries or death allegedly resulting from exposure to asbestos fibers contained in products formerly manufactured, sold, installed or distributed by one or more of Amici.[2] Each Amicus purchased comprehensive general liability insurance policies, which include products liability coverage, continuously for a period of many years, with coverage for many Amici beginning in the 1930's.

The injuries that give rise to these claims begin shortly after asbestos fibers are ingested or inhaled and become lodged in body tissues. External symptoms of these injuries (*e.g.*, asbestosis, mesothelioma, and bronchogenic carcinoma), however, may not appear until 10 to 40

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[1] A list of pending suits to which Amici are parties is set forth in Attachment A hereto.

[2] By the early 1970's, each Amicus that had produced or sold asbestos-containing products of the type on which these suits are generally based had discontinued such activity.

One of Amici, Brinco Mining Limited, mines and sells raw asbestos.

years after initial inhalation or ingestion, and when symptoms do appear it is impossible to determine what portion of an injury is attributable to a particular period of time. Because of the nature of asbestos-related injuries, claimants in the underlying cases frequently have alleged that they initially inhaled asbestos fibers in the 1940's or 1950's and continued to inhale asbestos fibers over a period of many years. When claimants have proven compensable injuries from asbestos fibers, courts adjudicating the underlying cases typically have held the defendant companies jointly and severally liable for the injuries because it is impossible to determine what portion of an injury was caused by each company's products or occurred at particular times. *See, e.g., Borel* v. *Fibreboard Paper Products Corp.* 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

When the earliest asbestos-related cases were filed, many insurance companies undertook to defend and pay the liabilities of Amici without financial participation by the insured. However, as the volume of cases increased substantially by the mid-1970's and as it became apparent that more claims would be filed in the future, a large segment of the insurance industry, including the most significant insurers of Amici and most of the petitioners here, simultaneously: (1) refused to provide any further effective coverage for asbestos claims, and (2) began taking the position, contrary to their prior practice, that the only insurance that would apply to asbestos claims was that which the insurers refused to provide, namely, insurance in effect at the time the injuries become "manifest."

Another group of insurers, including the remaining insurance companies appearing here, propounded an "exposure/pro-rata" approach similar to that eventually adopted in *Insurance Co. of North America* v. *Forty-Eight Insulations, Inc.*, 451 F. Supp. 1230 (E.D. Mich. 1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *clarified*, 657 F.2d 814 (6th Cir.), *cert. denied*, 50 U.S.L.W. 3466

(Dec. 8, 1981), *pet. for reh'g filed* (Dec. 30, 1981) (*"Forty-Eight Insulations"*). Under this approach, these insurance companies would prorate mechanically the amount of a claim and the defense costs over the years of a claimant's exposure to asbestos fibers and would accept responsibility only for their arbitrarily allocated portion of a claim, leaving the insured to pay a share of the claim and defense costs.

The two approaches developed by the insurance industry would deny each Amicus substantial amounts of the coverage it purchased over many years. Under the "manifestation" approach, although a company may have been fully insured throughout the period in which it manufactured, sold, installed or distributed asbestos-containing products and individuals allegedly were injured from exposure to those products, it nonetheless would be deprived of the benefit of the insurance it had obtained because the consequences of the asbestos-related injuries do not become manifest until later years, when no insurance is available. Under the "exposure/pro-rata" approach, while coverage would apply to injuries beginning shortly after initial inhalation of asbestos, insurers would be allowed by means of a *post hoc*, arbitrary formula to allocate a portion of their responsibility back to their insureds.

This Hobson's choice was presented by the insurance industry to all policyholders. One of the major "manifestation" carriers (INA) acted quickly to obtain judicial sanction for its new position by immediately instituting suit against one of its smallest insureds. That suit, *Forty-Eight Insulations*, was tried and decided on a severely restricted record that presented essentially a choice between the insurers' two "theories" of interpretation, despite the existence of substantial amounts of evidence in the insurance companies' files showing that the policies were to cover all liability and all defense costs for asbestos-related claims. Certain of these materials have to come to light in *Keene*. In addition, fac-

tual evidence not available in the *Keene* record has been produced in Amici's cases.

Nonetheless, having forced the matter to litigation by refusing coverage, the insurers pressed their new theories in a number of forums. Adverse decisions have been appealed, while the insurers continue to litigate the issue in other jurisdictions. The insurers are now confronted with a decision in *Keene* that, accepting neither of their theories, extends more complete coverage to the insured. Seeking to personalize the decision as the "aberrant" and "idiosyncratic" views of a single jurist—and ignoring the fact that it was a panel decision and that nine out of ten judges on the Court of Appeals voted against rehearing *en banc*—the insurers seek to have the decision quickly expunged through review by this Court. The fundamental position of all of the petitioning insurance companies is that the Court should grant *certiorari* to reject the decision below and adopt one or the other of the insurers' "theories" of coverage. Such an action by this Court would significantly reduce, or virtually eliminate, coverage for asbestos-related claims against Amici and other companies that have manufactured, distributed or installed asbestos-containing products.

SUMMARY OF ARGUMENT

This case presents no basis for a grant of *certiorari*. There is simply no conflict warranting review by this Court; the decision below presents only a logical step forward from earlier appellate decisions in the interpretation of the policies at issue as a more complete factual record has been developed and arguments for full policy coverage have been put forth by the insured. Indeed, the decision of the District of Columbia Court of Appeals is compelled by principles of insurance policy construction.

For other reasons as well, the Court should not grant *certiorari* in this case. The insurance companies ask, in effect, for this Court to overturn the decision below

and substitute one of their two theories of coverage. Such a result cannot be reached because, even apart from the legal principles bearing on the policies' interpretation, the *Keene* record does not support the insurance companies' position. In the face of this record, the relief the insurance companies seek cannot be granted. Furthermore, while the *Keene* record supports the decision below, additional evidence of the drafting history is being produced in other cases. Particularly in the circumstances at hand, when more complete evidence concerning the meaning of these policies is becoming available in pending cases, it would be inappropriate for this Court to undertake the unusual step of enunciating a "nationwide" rule on a nonfederal issue. Consideration of the policies' interpretation by this Court now could operate to impede the development of the factual record and thus possibly to interfere with consideration of the policy language by state courts now reviewing it.

ARGUMENT

I. THE DECISIONS OF THE DISTRICT OF COLUMBIA CIRCUIT AND OTHER COURTS OF APPEALS PRESENT NO CONFLICT WARRANTING SUPREME COURT REVIEW.

The insurance companies paint *Keene* and the other courts of appeals decisions as a series of diametrically inconsistent results, culminating in an "aberrant" decision on the part of the District of Columbia Circuit. But the cases show no such pattern. Instead of conflicting, the cases trace the courts' attempts, based on the records before them, to provide the coverage reasonably to be expected under the policies and to take into account the steadily expanding evidence of the insurance companies' intent and meaning in drafting the policies.

This is seen in the results reached. In the first case brought, *Forty-Eight Insulations*, the court of appeals, unaided by evidence as to the drafting history of the

meaning of the insurance policies at issue, nonetheless ruled essentially in line with the position advocated by the insured, which had argued the case almost entirely on the theories advanced by the two camps of insurers.[3] In *Porter* v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (Dec. 8, 1981), *petition for reh'g filed* (Jan. 2, 1982) (*"Porter"*),[4] even more severe limitations are apparent.[5]

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[3] *Forty-Eight Insulations*, as noted above, was filed by INA against one of its smaller insureds shortly after INA changed the manner in which it handled asbestos-related claims to a "manifestation" basis. *See Forty-Eight Insulations*, 451 F. Supp. at 1239. As a result, much information of critical significance was not before the district court or the court of appeals.

Documents concerning the policies' drafting history were not made available by the insurers for consideration. Additionally, the only two constructions of the coverage obligation presented to the court of appeals in *Forty-Eight Insulations* were those devised by the insurance industry, "manifestation" and "exposure/pro-rata", of which the latter construction was more favorable to the insured.

On the basis of these arguments concerning the policies' meaning and the limited record before it, the Sixth Circuit construed the ambiguities in the policy in favor of the insured to provide coverage for asbestos-related claims in the manner sought by the insured—the "exposure/pro-rata" approach. *Forty-Eight Insulations*, 633 F.2d at 1219.

[4] *Porter* did not even involve a manufacturer or distributor of asbestos-containing products. The central issue in the suit was a tort claim by a worker against a manufacturer of respirators; that company's insurance coverage arose only belatedly as a secondary issue, and when it finally arose, the issue was addressed only by the insurance carriers. Once again, the insurance industry's two alternative interpretations were the only ones presented to the court, and no evidence concerning the carriers' understanding of the policies was discovered or introduced. Even so, the Fifth Circuit rejected the "manifestation only" approach.

[5] Precisely the same was true at the district court level in Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co., 532 F. Supp. 110 (D. Mass. 1981), *appeals docketed* Nos. 81-7161-63 (1st Cir., Oct. 21, 1981) (*"Eagle-Picher"*), although the district court reached a different result.

In *Eagle-Picher*, the insured sought to preserve the "manifestation" approach. Unlike other companies, most of which have pur-

Keene, in contrast, appreciated that both choices presented by the insurance companies worked to the advantage of the insurance companies and to the disadvantage of the insured and that those choices were not permitted, much less compelled, by a fair reading of the policies or by the evidence available to Keene concerning the policies' meaning. Therefore, Keene sought full coverage from each of its policies, to which the District of Columbia Circuit found it was entitled.

Thus the cases decided by the appellate courts do not present the type of head-on conflict that would be present if one court of appeals held that the standard policy language at issue means that only "exposure" triggers

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chased substantial amounts of comprehensive insurance continuously since the 1930s, Eagle-Picher did not obtain comprehensive insurance coverage until 1968, some 37 years after it began manufacturing asbestos products and just three years before it ceased manufacturing such products. *Eagle-Picher*, 523 F. Supp. at 111. Thus the "exposure/pro-rata" approach offered Eagle-Picher little prospect for any coverage of asbestos-related claims.

Under these circumstances, the comprehensive nature of the insurance policies was not pursued in the district court. The district court never heard argument supporting the view that coverage under the policies is triggered by any injury whether or not it becomes manifest or is diagnosed during the policy period. Furthermore, the district court accepted no secondary documentary evidence concerning the policies' meaning for the apparent reason that all parties asserted, despite their disagreement over the policies' meaning, that the policies were unambiguous.

On this basis, the district court concluded that "manifestation," not "exposure," triggers coverage, emphasizing that that was the result sought by the insured and the result that would maximize insurance coverage as between the options presented. The court distinguished *Forty-Eight Insulations* on the ground that the underlying facts of coverage were different "from a public policy point of view," thus warranting a different result. *Id.* at 117.

The district court's holding has been appealed by Eagle-Picher, which supports the approach adopted by the District of Columbia Circuit in *Keene*. Amici also believe the district court erred in adopting manifestation as the only trigger of coverage and several Amici filed a brief explaining their views before the First Circuit.

coverage and another court of appeals held that only "manifestation" triggers coverage. Instead, in *Forty-Eight Insulations* and *Porter*, the courts held that "injury" triggers coverage and occurs during "exposure." Subsequently in *Keene*, the court held that "injury" triggers coverage and occurs during "exposure," "exposure-in-residence" and "manifestation." Therefore, *Keene* presents an extension of earlier appellate cases, not a direct conflict between two diametrically opposing views.

There is nothing extraordinary about the manner in which the resolution of these issues is evolving in the appellate courts. The consistent pattern of these cases is to reach results, as urged by the insureds, that will provide some measure of protection and to reject the theories of insurance companies that minimize or eliminate coverage altogether.[6] As in so many other contexts, these cases have built upon each other in light of a growing body of evidence as to the fair meaning of the contracts and in light of argumentation presented by policyholders demonstrating the necessity of extending and supplementing the earliest decisions on this subject.

The decisions of the circuit courts to date are not in "conflict" in any sense that warrants Supreme Court intervention. The conclusions of the District of Columbia Circuit are simply attributable to the fact that *Keene* was the first case in which the insured urged a policy interpretation that would make available all of the coverage the policies provide. These cases are best understood in terms of the evolution of the litigation concerning the meaning of the policies at issue here, a process that need not and should not call for Supreme Court action at this time.

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[6] The United States District Court for the Eastern District of Pennsylvania has recently taken the same approach in Commercial Union Ins. Co. v. Pittsburgh Corning Corp., Asbestos Lit. Rep. 4263, 4267 (E.D. Pa. Dec. 4, 1981) (No. 81-2129).

II. THE DISTRICT OF COLUMBIA CIRCUIT CORRECTLY CONSTRUED THE COMPREHENSIVE GENERAL LIABILITY POLICIES.

A. Legal Principles of Insurance Policy Construction Compel the District of Columbia Circuit's Interpretation of This Policy Language.

The coverage clauses of the policies sold to Keene by Liberty Mutual, Hartford, INA and Aetna—clauses that contain "standard-form" language drafted by the insurance companies and appear uniformly in comprehensive general liability insurance policies—typically provide:

> [The insurance company will] pay on behalf of the insured [Keene] *all sums* which the insured shall become legally obligated to pay as damages because of [*bodily injury*] . . . .

The policies further define "bodily injury" as "bodily injury, sickness or disease," [7] and provide that such bodily injury must occur during the policy period and must be caused by an "occurrence," defined as "an accident, including . . . exposure to conditions." Therefore, if an insured incurs a legal obligation to pay damages because of indeterminate amounts of injury occurring over extended periods of time from exposure to asbestos fibers, each insurance carrier on the risk when such injury occurs must pay "all sums" assessed against the insured.

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[7] The petitioners urging "manifestation," *e.g.*, INA, consistently misquote the coverage policy language as referring only to "disease," ignoring the fact that the policies provide comprehensive coverage for all "injuries."

The "pro-rata" carriers, in turn, offer their own self-serving characterization of the policies as providing indemnification only for the bodily injury occurring during the policy period, when in fact the policies provide coverage for *all* of the insured's *legal liability* attributable to any injury during the policy period.

Moreover, the medical evidence heard by every court that has considered insurance coverage of asbestos-related claims has established that persons diagnosed as having an asbestos-related disease have suffered bodily injury beginning shortly after inhalation of asbestos fibers. *See Keene*, slip op. at 15-22; *Forty-Eight Insulations*, 633 F.2d at 1222; *Porter*, 641 F.2d at 1144-45; *Eagle-Picher*, 523 F. Supp. at 116; *Commercial Union Insurance Co.* v. *Pittsburgh Corning Corp.*, Asbestos Litigation Rep. 4263, 4271-73 (E.D. Pa. Dec. 4, 1981) (No. 81-2129).

For these reasons, Amici believe that the policy language clearly covers all liability for asbestos claims. Even assuming, however, as did the District of Columbia Circuit, *Keene*, slip op. at 15, that the policies are ambiguous, universally accepted principles of insurance contract construction require ambiguous insurance policies to be interpreted against the insurance carriers that drafted them.[8] Therefore, each policy on the risk during a period of injury is triggered by that injury and once triggered, each policy covers full liability, subject to the policy limits.[9] It bears emphasis that the coverage of asbestos-related claims by comprehensive general liability insurance policies is an issue that has not yet been decided by a state court. Thus the District of Columbia Court of Appeals acted properly in applying the principle that state courts "will follow the rule that appears best to

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[8] *See, e.g.*, Couch on Insurance 2d § 15.73 at 777 (2d ed. Anderson 1959); R. Keeton, Basic Text on Insurance Law, § 6.3(a) at 351 (1971); New York Home Furniture Co. v. Aetna Cas. & Sur. Co., 379 F.2d 879 (D.C. Cir. 1967); Moffat v. Metropolitan Cas. Ins. Co., 238 F. Supp. 165, 169 (M.D. Pa. 1964).

[9] Imposition of liability for an entire loss and for all defense costs associated with a claim will permit the insured to recover only once. The insurance companies may apportion a loss among themselves by applying the "other insurance" clauses of the policies or the doctrine of contribution.

effectuate the policies that underlie the rule." *Bowen* v. *United States*, 570 F.2d 1311, 1322 (7th Cir. 1978).

Contrary to the arguments of a few carriers, there is no "traditional" body of state law that compels adoption of their "manifestation" theory.[10] A substantial portion of the insurance industry, including about half the members of Lloyds of London, espouses the "exposure/pro-rata" theory. Indeed, the actions of the very carriers making this argument belie their statements.[11]

B. The Factual Record in *Keene* Supports the District of Columbia Circuit's Interpretation.

In view of its rulings on the law governing this case, the District of Columbia Circuit did not address the factual record in *Keene*. Nonetheless, Amici believe this Court should be aware that extrinsic evidence in the *Keene* record fully supports the District of Columbia Circuit's interpretation of the policies.

The comprehensive general liability policies at issue contain standard language drafted by committees of in-

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[10] The cases the carriers have cited in their petitions are neither dispositive (as the carriers imply) nor, indeed, particularly instructive, since they do not address the interpretation of comprehensive general liability insurance contracts and all of them involve public policy considerations different from those at issue here. Many state court cases have reached results similar to those in *Keene* in analogous circumstances. *See, e.g.*, Snapp v. State Farm Fire & Cas. Co., 206 Cal. App. 2d 827, 24 Cal. Rptr. 44 (1962), *aff'd en banc on other grounds*, 60 Cal. 2d 822, 388 P.2d 844, 36 Cal. Rptr. 612 (1964); Davis v. Poelman, 319 So. 2d 351 (La. 1975). Federal courts have also reached the same results in interpreting similar policy language. *See, e.g.*, Emons Industries, Inc. v. Liberty Mut. Fire Ins. Co., 481 F. Supp. 1022 (S.D.N.Y. 1979).

[11] Before INA filed suit in *Forty-Eight Insulations*, it did not handle asbestos-related cases on a "manifestation" basis. *See Forty-Eight Insulations*, 451 F. Supp. at 1239. Many other carriers acted in a manner contrary to the "manifestation" theory. For example, evidence in the *Keene* record shows that Liberty Mutual and Aetna did not confine their handling of asbestos-related claims to a "manifestation" approach.

surance industry organizations, the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau, whose members were employees of major insurance carriers, including petitioners. Minutes of these committee meetings indicate the insurance companies' understanding of their policies' applicability to injuries that develop over long periods of time. We mention here only a few of the more critical points shown by the documents in *Keene*.

Certain petitioners (including INA, Liberty Mutual and Aetna) seek an opportunity to argue to this Court that their insurance policies are clearly meant to provide coverage only when an injury or disease becomes "manifest" during a policy period. But documents in this case indicate that when drafting the very policy language at issue, these same insurers considered *and rejected* language specifying that injury or disease resulting from exposure to conditions would be deemed to occur for coverage purposes only when such injury or disease becomes "manifest." Other documents reflect contemporaneous statements by the industry members responsible for drafting the 1966 policy form at issue that injury at the time of exposure would trigger coverage and that *each policy* would cover all liability from a claim.[12]

The minutes of a meeting of the Enterprise Liability Study Group of the American Mutual Insurance Alliance and the American Insurance Association held on April 21, 1977, to discuss the problem of asbestos claims, reflect

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[12] For example, Liberty Mutual explained its position in a memorandum to its underwriters dated July 18, 1966. After noting that the policies already covered gradual bodily injury, the memorandum discussed the policy limits:

> If the gradual [bodily injury] extends past one or more policy anniversary dates the limits will pyramid . . . .

(J.A. at 1602, 1605).

Documents from the *Keene* record are cited to the page on which they apear in the Joint Appendix ("J.A.") filed in the Court of Appeals.

the insurance companies' views of their coverage obligations in recent years:

> The majority view was that coverage existed for each carrier throughout the period of time the asbestosis condition developed, i.e., from the first exposure through the discovery and diagnosis. The majority also contended that each carrier on risk [sic] during any part of that period could be fully responsible for the cost of defense and loss. The majority relied on Borel v. Fibreboard Paper Products Corporation, 493 F.2d 1076, U.S. Court of Appeals, 5th Circuit (applying Texas law).

(J.A. at 986, 987).

Still other documents show that in response to the financial liabilities presented by asbestos and similar claims, the insurance industry has undertaken in recent years to revise the policy and, in the process of doing so, has acknowledged expressly that the current policy does *not* make coverage contingent only upon "manifestation" and must be *rewritten* in order to do so:

> *Presently, the standard general liability policies provide coverage for injury which occurs during the policy period, regardless of when the exposure to harmful conditions takes place, or when injury becomes known or manifest.* Under this concept, if an injury results from the cumulative exposures over a period of time, it will be covered by all policies providing coverage during the period of exposure. As a result, the losses will be paid by the carriers providing coverage during the exposure period on a pro-rata basis.
>
> A number of affiliated companies feel that this method is not desirable because *it pyramids the limits available to the insured for losses resulting from continuous or repeated exposures over multiple policy periods.*

Minutes of the March 28, 1978, Meeting of the General Liability Rules and Forms Committee of the Insurance Services Office (emphasis added) (J.A. at 1823, 1841).[13]

These statements from documents in the *Keene* record reveal the insurance companies' awareness that each policy during the injury period covers the entire liability on an asbestos-related claim and show that for many years most insurance companies acknowledged and acted on this premise. Thus the evidence discovered by *Keene* concerning the carriers' own construction of their policies fully supports the District of Columbia Circuit's interpretation.

III. THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR THIS COURT TO REVIEW.

In addition to the above, at least two other considerations militate against Supreme Court review of this case.

First, the relief petitioners seek cannot be granted. In urging that review of *Keene* by this Court is necessary to provide a uniform rule of construction, the competing camps of insurers seek, in reality, reversal of the opinion below and substitution of either the "manifestation" or the "exposure/pro-rata" theory. Amici have explained above, however, that the record in this case fully supports the decision below. At the *very least*, the evidence demonstrates that the policies are ambiguous and admit of the construction adopted by the court below.

In the face of this record, on no theory can this Court be asked to rule at this time that either of the insurers' theories of coverage represents the correct interpretation of the policies. The factual record in *Keene* is utterly bereft of support for either of these theories of coverage—in fact, it directly collides with them. The great weight of the documentary evidence on the insurers' in-

[13] At the time of this meeting, the members of this committee included petitioners Aetna, INA, and Hartford.

tent and interpretation in drafting the form policies placed before the District Court was that offered by Keene. The same was true in the Circuit Court. The insurance companies' position before those Courts and now before this Court, comes down to an argument that the case can be resolved in their favor on a summary judgment basis and without regard to consideration of substantial evidence from the carriers' own files that is squarely at odds with the interpretations sought. That result would be proper only if this evidence were somehow deemed beside the point, i.e., in summary judgment parlance, not "material facts."

Judgment can be granted in favor of the insured because the language of the contract, the vastly disparate reading of the contracts adopted by the various insurers and the application of accepted principles of insurance contract construction support that conclusion as a matter of law. But the reverse is not true: under no circumstances can it reasonably be argued that either of the theories advanced by the competing camps of insurers are so clearly compelled as to survive contrary evidence of the industry's own intent, interpretation and application of the policies.[14]

Second, since Keene's evidence was proffered to the District Court in this case, a great deal of additional extrinsic evidence concerning the intent of the insurance companies when they drafted the standard-form language at issue has been discovered in other suits, and there is a prospect that far more will be uncovered. Certain of the most significant documents produced in other suits are not in the *Keene* record. These new documents suggest that review of *Keene* by this Court is both unneces-

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[14] The carriers can find no shelter in arguments that they have had no chance to produce evidence of drafting history, since these documents were not excluded by the District Court and they had every opportunity to respond to it in both the District Court and the Court of Appeals.

sary, because the documents confirm the propriety of the result below, and undesirable, because it could operate in pending cases to impede development and presentation of the factual record. Although the newly produced documents are not in the *Keene* record, Amici note for the Court's consideration statements from two of the more significant new documents.

A June 1, 1960 draft of the coverage clauses for the comprehensive general liability policy provided for "injury" under the policies to be deemed to occur at manifestation of symptoms; it stated:

> All bodily injury and property damage resulting from one accident or from continuous or repeated exposure to substantially the same general conditions shall be deemed to occur at the time and place at which the first of any such injury or damage becomes manifest.[15]

After considering this language, the insurance company members of the committee responsible for redrafting the standard-form language rejected it in favor of the definition of "bodily injury, sickness or disease" in the Keene policies. (*See supra* p. 10.)

Similarly, an agenda for the December 13, 1979, meeting of the General Liability Actuarial Subcommittee on the Insurance Services Office, demonstrates the insurance companies' understanding that the current policies must be amended to cover "manifestation" only and that there are significant differences between "manifestation" only and the current coverage:

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[15] Certain petitioners represent to the Court that the policies were "specifically intended" to provide coverage only for injuries that become "manifest" during the policy period. (Commercial Union Pet. at 14; INA Pet. at 12). Yet all petitioners have in their possession this and other documents showing that the industry drafters *expressly considered and rejected* "manifestation" as the sole trigger of coverage. Petitioners have not brought the documents to the attention of this or any other court. A number of such documents have been discovered by Amici in their cases, and it is anticipated that additional documents will come to light as discovery progresses.

"Manifestation" is a concept which, if implemented, would fix the date of loss at the time that an injury manifests itself, as opposed to when an injury occurs. This would have the effect of eliminating the practice of stacking policy limits across years of exposure, when this exposure is continuous and cumulative. It would also allow for quicker identification of multi-claim losses arising from the same causative factor. If the industry adopts the "manifestation" concept, it would be implemented through a change in wording in the contemplated CGL policy. Manifestation would have the greatest impact on Products Liability, where certain injuries result in long term exposure (e.g. asbestos).

CONCLUSION

This case presents no basis for a grant of *certiorari*. It does not involve a federal statute. It does not involve any question of federal law. There is presently no conflict among the circuits warranting Supreme Court review. The decision in *Keene* simply results from an evolution in the legal and factual arguments before the Court of Appeals. Even the petitioners recognize that this Court will review a holding of a court of appeals on a case involving issues of state law only in extraordinary circumstances. *See Pierson* v. *Ray*, 386 U.S. 547, 558 n.12 (1967); *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).[16] Yet petitioners have not demonstrated such circumstances here. There is no head-on conflict between the federal appellate courts; the decision below is a logical step forward from the earlier cases and is supported by the extrinsic evidence in the *Keene* record and confirmed by evidence produced in other courts.

For all of these reasons, Amici urge that the Court deny the petitions for *certiorari*.

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[16] *E.g.*, Seese v. Volkswagenwork A.G., 648 F.2d 833 (3d Cir.), *cert. denied*, 102 S.Ct. 330 (1981); McKenna v. Ortho Pharm. Corp., 622 F.2d 657 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980).

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ATTACHMENT A

PENDING ASBESTOS INSURANCE LITIGATION INVOLVING AMICI [1]

Armstrong World Industries, Inc. v. *Aetna Casualty & Surety Co., et al.*, No. C-315367 (Super. Ct., Los Angeles Cty., Ca., filed March 6, 1980, amended March 19, 1981) *

ACandS, Inc.. v. *Aetna Casualty & Surety Co., et al.*, No. 80-1341 (E.D. Pa., filed Apr. 4, 1980)

Asten Group, Inc., t/a Asten-Hill Co. v. *Commerce & Industry Insurance Co., et al.*, No. 68-19 (Ct. of Common Pleas, Philadelphia Cty., Pa., filed July 15, 1980)

Brinco Mining Ltd. v. *Commercial Union Assurance Company Ltd., et al.*, Nos. 38794/79, 45442/79, 53762/80, 4170/81 (S.Ct., Ontario, Canada)

The Celotex Corp. v. *Aetna Casualty & Surety Co.*, No. 79-5885 (Cir. Ct., Hillsborough Cty., Fla., filed May 16, 1979)

Crown Cork & Seal Company, Inc. v. *Aetna Casualty & Surety Co., et al.*, No. 1292 (Ct. of Common Pleas, Philadelphia Cty., Pa., filed Sept. 12, 1978)

Firemen's Fund Insurance Co. v. *Fibreboard Corp. et al.*, No. C735-885 (Super. Ct., San Francisco Cty., Ca., filed May 29, 1979) *

Standard Asbestos Manufacturing & Insulating Co.[2] v. *Royal Indemnity Insurance Co., et al.*, Civ. 80-14909 (Cir. Ct., Jackson Cty., Mo., filed July 13, 1979)

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[1] Amicus Brand Insulations, Inc. is not currently involved in such litigation.

[2] Standard Asbestos is now Standard Insulations, Inc.

* These cases have been coordinated with GAF Corp. v. Insurance Company of North America, et al., No. C286017 (Super. Ct., Los Angeles Cty., Ca., filed May 31, 1970) and Johns-Manville Corporation, et al. v. The Home Insurance Company, et al., No. C765226 (Super. Ct., San Francisco Cty., Ca., filed March 31, 1980) sub nom. In re Asbestos Insurance Coverage Cases, No. 1072 (Super Ct., San Francisco Cty., Ca.).

Amicus Brief

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MOTION FILED
DEC 30 1981

No. 81-1012

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,
v.
KEENE CORPORATION,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE OF COMMERCIAL UNION INSURANCE COMPANIES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether This Court Should Settle The Conflict Among The Decisions Of The Fifth, Sixth And District Of Columbia Circuit Courts Of Appeal, And The District Court For Massachusetts, As To When An Insurer Is On The Risk For Cumulative Traumatic Disease When:

   (a) Four federal courts in exercising diversity jurisdiction have applied similar principles of state law to similar insurance contract provisions, and yet have reached three irreconcilable results; and

   (b) The lack of resolution of this question (i) burdens the federal and state judiciaries, (ii) imperils the financial stability of the affected insurance and manufacturing industries; and (iii) does not further the goal of prompt and equitable compensation of claimants.

2. Whether A Federal Court In a Diversity Case May Eschew Consistent State Court Interpretations Of Similar Insurance Contract Language And Adopt Different Tenets Of Contract Construction To Achieve The Result That Court Prefers When:

   (a) That court's treatment of the insurance contracts as contracts of adhesion is made with no showing concerning the relative bargaining positions of the parties at the time the contracts were entered; and

   (b) The Court of Appeals adopts an interpretation of the meaning of contract terms in derogation of court-elaborated standards of insurance contract law and established underwriting practices.

3. Whether Under Applicable Decisions Based Upon State Law And Emerging Medical Evidence, Liability

Under Comprehensive Liability Insurance Policies Commences:

(a) When inhalation of airborne asbestos produces clinically evident diagnosable disease (*i.e.*, the "manifestation" theory); or

(b) When a claimant is exposed to airborne asbestos (*i.e.*, the "exposure" theory); or

(c) From the time a claimant is exposed to airborne asbestos and any time thereafter that inhaled asbestos remains "in residence" in the lungs (*i.e.*, the "*Keene*" interpretation).

LIST OF PARTIES

Petitioner Insurance Company of North America ("INA") was a Defendant in the District Court and an Appellant and Cross-Appellee before the D.C. Circuit. Respondent Keene Corporation ("Keene") was Plaintiff in the District Court and Appellant and Cross-Appellee before the D.C. Circuit.

Hartford Accident & Indemnity Company ("Hartford"), Liberty Mutual Insurance Company ("Liberty Mutual"), Aetna Casualty & Surety Company ("Aetna") and Pennsylvania Manufacturers' Association Insurance Company ("PMA") were also Defendants before the District Court. Hartford was an Appellee in the D.C. Circuit. Aetna and Liberty Mutual were Appellants and Cross-Appellees in the D.C. Circuit. PMA was dismissed from the suit in the District Court.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1012

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

MOTION FOR LEAVE TO FILE

Pursuant to Rule 36.1 of the Rules of the Supreme Court, Commercial Union Insurance Companies ("Commercial Union"), *amicus curiae* to the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in the proceeding below, respectfully requests that this Court grant leave to file the accompanying Brief in Support of the Petition for A Writ of Certiorari. Commercial Union has determined that at least one of the parties to the proceeding before the D.C. Circuit will not give written consent to this Brief in Support.

A. Nature of Commercial Union's Interest

At this writing, there are pending nineteen declaratory judgment actions in federal and state courts throughout the country concerning respective manufacturer and insurer liability for asbestos-related diseases under substantially similar comprehensive liability insurance policy

provisions.[1] Commercial Union is a party to ten of these actions. A decision by this Court on the issues presented by Petitioner and Commercial Union may affect dispositively the outcome of these pending cases.

B. Background

At issue below was language in comprehensive liability insurance policies providing for insurer indemnification when a claim is made against Keene for "bodily injury" caused by an "occurrence." Such "occurrence," which would be caused by exposure to "conditions," must "resul[t], during the policy period, in bodily injury." Pet. App. A at 6a.

At trial and upon appeal, Keene and one insurer, another party, argued that this contract provision created insurer liability for insurers on the risk, *i.e.*, holding policies with the insured, at any time the claimant was exposed to airborne asbestos. Other insurer parties, and *amicus curiae* Commercial Union, maintained that this and similar provisions create insurer liability for indemnification when the asbestos-related disease "manifests" itself by diagnosable symptoms impairing bodily function.[2]

In its Judgment and Opinion entered October 1, 1981, the D.C. Circuit characterized the policies at issue as contracts of adhesion, and proceeded to interpret the provisions by exclusive reference to the asserted expectations of Keene at the time the policies were executed. Pet. App. A at 12a. The D.C. Circuit adopted neither the "exposure" nor the "manifestation" construction, and instead interpreted the provision to establish joint and several liability for any insurers on the risk at any time from a claimant's initial exposure to airborne asbestos

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[1] Appendices D & E of Petition ("Pet. App.").

[2] The opinions of the District Court and the D.C. Circuit are set out at Pet. App. B & A, respectively.

up to the time, if any, that asbestos-related disease becomes manifest, even if the insurer's last policy with the insured expired decades ago. Pet. App. A. at 23a.

C. Questions of Law or Statements of Fact Not Heretofore Presented

Commercial Union believes that the following questions of law and statements of fact have not been adequately presented by the parties:

1. *Questions of Law*

(a) Whether the fact that similar liability insurance contract language is employed generally by insurance companies and their insureds in entering insurance agreements renders such contracts as contracts of adhesion without a showing that the insurer enjoys a superior bargaining position, and where the insured is able to negotiate freely substantive changes in the policies and can, as Respondent herein often did, change insurers at regular intervals.

(b) Whether traditional and court-elaborated insurance practices and rules of insurance contract construction require that liability insurance coverage be triggered solely by the manifestation of bodily injury, sickness or disease.

2. *Statements of Fact*

(a) The book value net worth of asbestos companies involved in asbestos-related compensation litigation is approximately $25.6 billion. That of the 51 insurance companies involved in asbestos-related compensation litigation is approximately $9.7 billion. The combined book value net worth is therefore approximately $35.3 billion. A recent projection by economists estimates the liability for asbestos-related deaths of asbestos workers alone for the next twenty years at approximately $38.0 billion in today's dollars. If the compensation criteria set by the D.C. Circuit becomes the law, both the insurance companies and the asbestos companies face insolvency. If the

Keene Opinion is adopted, substantial economic dislocation to these and other industries can be avoided only by involving other public and private sources in providing compensation for victims of a health problem of national proportions.

(b) New and emerging medical evidence presented to the District Court in this proceeding and to tribunals in related asbestos compensation suits proves, consistent with a long line of decisional authority, that asbestos-related injury does not occur until such time as the disease is manifest in diagnosable symptoms of impairment of bodily function.

These issues of law and statements of fact each have relevance to the disposition of this case. As the proper interpretation of substantially similar general liability insurance provisions is at the heart of this action, a decision by this Court can establish law on these questions that will be followed by federal and state courts throughout the nation in suits involving insurers, manufacturers, and claimants not parties herein. The arguments of the "exposure" and "manifestation" exponents alike are tempered by either, and perhaps both, of the following factors: (1) their expectations, often including contract interpretation advanced by legal counsel, at the time the contracts were written, and (2) the potential financial liability then, or now, recognized by the contracting parties. Because this Court's decision will have a substantial effect upon the insurance and asbestos industries, claimants and the general economy, the perspective of a non-party, not bound by the specific contracts herein, should be of value to this Court's deliberations.

Moreover, the issues herein are not confined to the tragic health consequences of respirable asbestos, but affect the allocation of responsibility for compensation of many other diseases with long latency periods, involving DES, ethyl-benzene and Agent Orange, to name only a few. The D.C. Circuit's Opinion is premised on its

belief that insurers are able to satisfy the leviathan financial liability imposed in this and similar suits. Commercial Union's Brief in Support demonstrates the financial impossibility of achieving the D.C. Circuit's goal, the court's improper choice of law for construing insurance contracts between commercial coequal contracting parties, and the flat inconsistency between the D.C. Circuit's decision and the decisions of analogous state court holdings and contemporary medical evidence. For these reasons, it is crucial that this Court consider the arguments of insurers that, although not parties to the specific contracts at issue herein, will be affected by this Court's decision.

WHEREFORE, Commercial Union prays that the following Brief in Support be accepted for filing.

Respectfully submitted,

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December 30, 1981

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1012

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,
v.
KEENE CORPORATION,
Respondent.

BRIEF OF AMICUS CURIAE COMMERCIAL UNION INSURANCE COMPANIES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Commercial Union Insurance Companies ("Commercial Union"), *amicus curiae* in the proceeding below, respectfully prays that the Court grant the Insurance Company of North America ("INA") Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit.

INTEREST OF THE AMICUS CURIAE

In Appendices D and E to the Petition, there are listed nineteen pending declaratory judgment actions in state and federal courts where the basis of insurance coverage for asbestos-related disease is at issue. Commercial Union is a party to ten of these suits. A decision of this Court can be expected to affect substantially these pending cases.

STATEMENT OF THE CASE

In 1978, Keene filed an action for declaratory judgment and damages against its insurance carriers alleging that these carriers had failed to defend and indemnify Keene in suits brought by asbestos-related disease claimants. At issue was language in comprehensive general

liability policies providing for insurer indemnification should Keene be presented with a claim for "bodily injury" caused by an "occurrence." The time for such "occurrence," which could be caused by exposure to "conditions," is defined by the clause "which results, during the policy period, in bodily injury." [1]

Before the District Court Keene and one insurer party argued that the above contract provision triggered insurer indemnification liability at any time a potential claimant was exposed to respirable asbestos. Other insurer parties maintained that the inhalation of airborne asbestos did not create bodily injury, and therefore did not give rise to insurer indemnification liability, until it produced clinically evident diagnosable disease, *i.e.*, until it became manifest.

In a Memorandum Opinion filed January 30, 1981, the District Court concluded that application of pertinent state law to this contract required adoption of the exposure theory of insurer indemnification. Under the exposure theory, the time for the occurrence of "bodily injury" within the policy would be "at or near the first heavy inhalation of the fibers." Where more than one insurer was on the risk during the period of the claimant's exposure, each insurer would bear proportionate or pro-rata financial responsibility. Pet. App. B at 54a, 58a. In reaching its decision, the District Court gave great weight to the holding in *Insurance Company of North America v. Forty-Eight Insulations, Inc.*[2]

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[1] From December 31, 1961 through October 1, 1980, each of Keene's policies with INA, Liberty Mutual, Aetna and Hartford contained language similar or identical to that above. *See* Pet. App. A at 6(a). From November 1, 1948 through November 1, 1959, PMA insured Keene. Whether these policies included coverage for asbestos-related disease is at issue in *Keene Corp. v. PMA*, Civ. No. 78-1011 (D.D.C. Jan. 30, 1981), *remanded*, No. 81-1248 (D.C. Cir. Oct. 1, 1981). From November 2, 1959 through December 30, 1961, Keene carried no liability insurance pertinent to the coverage at issue herein.

[2] 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 50 U.S.L.W. 3461 (U.S. Dec. 4, 1981) (No. 81-198).

On February 20, 1981, the D.C. Circuit granted Keene an interlocutory appeal. Two more federal courts ruled on the same issues before the D.C. Circuit entered its opinion in *Keene*. On April 8, 1981, the Court of Appeals for the Fifth Circuit in *Porter v. American Optical Corp.*[3] adopted the "reasoning and result" of *Forty-Eight*. Then on August 14, 1981, the District Court for Massachusetts decided *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*[4] Following a painstaking examination of the policy language, insurance contract law, and public policy, the court in *Eagle-Picher* concluded that "application of general rules of insurance policy construction, with their public policy underpinnings," "dictate" that insurance coverage is triggered when the disease becomes diagnosable, *i.e.*, the manifestation interpretation. Pet. App. C at 76a.

In its October 1, 1981 Judgment and Opinion in *Keene*, the D.C. Circuit adopted yet a third interpretation of comparable contract language. Without regard to the November 2, 1959 through December 30, 1961 time period in which Keene carried no applicable insurance coverage, *see* n.1, *supra*, the D.C. Circuit declared that the insured should be "free of all liability for asbestos-related disease." Pet. App. A at 26a. Having so concluded, the court turned to pertinent state law to find that "potentially applicable state laws do not differ from one another." Pet. App. A at 10a n.10. The D.C. Circuit thereupon concluded that coverage liability under the policy provisions commenced not only upon manifestation of asbestos-related disease, but also upon and during "inhalation exposure and exposure in residence." Pet. App. A at 22a. The court established joint and several insurer indemnification responsibility for each insurer on the risk at any time from a claimant's initial

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[3] 641 F.2d 1128, 1145 (5th Cir. 1981), *cert. denied sub. nom., Aetna Casualty & Surety Co. v. Porter*, 50 U.S.L.W. 3460 (U.S. Dec. 4, 1981) (No. 81-200).

[4] No. 78-2739-Z (D. Mass. Aug. 14, 1981), *appeals docketed*, Nos. 81-1761-63 (1st Cir. Sept. 25, 1981); Pet. App. C.

exposure to respirable asbestos to the time, if any, that asbestos-related disease becomes manifest.

SUMMARY OF ARGUMENT

A. The conflict between the decisions in *Forty-Eight*, *Porter*, *Keene*, and *Eagle-Picher* concerning the meaning of substantially similar liability insurance policy provisions leaves manufacturers, insurers and claimants without guidance as to the means of prompt and equitable compensation of victims of asbestos-related disease. With perhaps twelve thousand asbestos-related claims now before various courts, this lack of unifying federal authority, left unresolved, will continue to sap judicial resources and will be financially ruinous for insurers and manufacturers alike. No matter how this Court decides the issues before it, only the involvement of additional public and private resources can solve this national health problem.

B. The contract of adhesion analysis adopted by the D.C. Circuit is inapplicable where a major manufacturer such as Keene negotiates for liability insurance coverage. Such insureds enjoy coequal bargaining status with the insurers, and are able to negotiate freely, *inter alia*, the scope of coverage, premiums, and deductibles. Where, as here, there exists no bargaining inequality between insurer and insured, the contract must be construed by reference to the understandings of both parties. Employing this analysis, the D.C. Circuit's interpretation is inconsistent with court-recognized principles of insurance contract law and long-standing underwriting practice.

C. A consistent line of state decisions considering both liability and health insurance policy language has held that personal injury does not occur until tangible symptoms demonstrate impairment of bodily function, *i.e.*, the injury or disease becomes manifest. These decisions are supported by recent and growing medical opinion that early exposure to respirable asbestos does not represent "injury, sickness, or disease" within the meaning of the policies.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

A. There Is A Clear Conflict Among The Decisions Of The Federal Courts Sitting In Diversity Suits As To The Construction Of Similar Contract Language.

The irreconcilable holdings of *Forty-Eight*, *Porter*, *Eagle-Picher* and *Keene* leave insurers, manufacturers, and claimants with inconsistent burdens and entitlements that only a decision of this Court can resolve.

The conflicting obligations imposed upon one insurer, Liberty Mutual, are representative of the conundrum insurers now face: Liberty Mutual, defendant in *Eagle-Picher*, exhausted its primary coverage by paying claims for Eagle-Picher Industries on the liability criteria of first manifestation. The Massachusetts District Court action arose upon the refusal of Eagle-Picher's excess carriers [5] to recognize such settlements as a proper use of primary coverage. The District Court endorsed Liberty Mutual's manifestation interpretation, and the question is pending on appeal to the Court of Appeals for the First Circuit.

The decisions in *Forty-Eight*, *Porter*, *Eagle-Picher*, and *Keene*, require Liberty Mutual to apply substantially identical insurance contract language in three inconsistent ways. In Massachusetts, Liberty Mutual must employ the manifestation compensation criteria; in the Fifth and Sixth Circuits, the pro-rata exposure interpretation; and in the District of Columbia, the interpretation that an insurer is on the risk from the time the claimant was first exposed to respirable asbestos through the time, if any, asbestos-related disease becomes manifest. The conflicting interpretations pose identical problems for all insurers that, like Liberty Mutual, INA, and Commercial Union, write coverage across the nation.

The uncertainty is worsened where a manufacturer regularly renegotiated its coverage with different in-

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[5] Most substantial industrial concerns carry both primary and excess insurance coverage. Excess coverage pays for claims that exceed the dollar limits of the primary policy.

surers, as did *Keene*. The three different interpretations derived by the lower courts prevent a manufacturer from knowing the basis upon which to invoke coverage from different insurers. When presented with a claim for asbestos-related compensation, the manufacturer is therefore likely to request contribution from all of its insurers. Due to the contrariety among the federal courts, an insurer may be best advised to seek or to await a declaratory judgment defining its responsibility. Counsel for both manufacturers and insurers will advise their clients to initiate or defend such actions in the forum most favorable to the result they seek, a criterion that may have more to do with an evaluation of the parties' variable liability under each of the three theories than with considerations of appropriate insurance contract construction. Only review by this Court can provide consistent federal application of similar state law in conformity with the Rules of Decision Act, 28 U.S.C. § 1652; *e.g.*, *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U.S. 637 (1947).

1. *The Lack of Unifying Federal Authority Will Have a Calamitous Effect Upon the Insurance and Manufacturing Industries Alike.*

There are now approximately 12,000 asbestos-related claims in federal and state courts[6] involving perhaps 25,000 individual claimants.[7] The number of such suits grows unabated, as victims or their families initiate approximately 500 new claims each month.[8] Those asbestos companies that have not exhausted their primary and excess insurance coverage will soon do so.

The decision in *Keene* is premised upon the assumption that insurers have the means to satisfy current and anticipated asbestos-related claims. The fallacy of this assumption is that the resources are not there, even if claimants turn to the manufacturers as well as to the

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[6] N.Y. Times, July 3, 1981, § 1, at 1, col. 1.

[7] Asbestos Lit. Rep., May 8, 1981, at 3336.

[8] *Id.* The number of claimants may reach 100,000 within the next few years. Bus. Week, Nov. 9, 1981, at 39.

insurers. Responsible members of the economic community have begun to evaluate the effect of asbestos-related litigation upon the insurance industry, the asbestos industry, and the United States economy. The book value net worth of the approximately 51 insurance companies involved in asbestos-related litigation is approximately $9.7 billion, and that of all asbestos companies is approximately $25.6 billion,[9] for a total of approximately $35.3 billion in combined assets. The present best projections of liability for the next twenty years for asbestos-related deaths of asbestos workers alone is approximately $88 billion in today's dollars.[10]

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[9] These figures, derived from Forms 10-K filed by publicly-held companies with the Securities and Exchange Commission, are probably larger than the actual worth of these companies. Insurance companies have made substantial investments in long-term, low risk bonds. To be liquidated such bonds must be sold at a discount, so the actual net worth of these companies upon liquidation would be significantly lower. Similarly, it is likely that the book value of the asbestos companies is also greater than actual market value.

[10] These figures are projections for loss of life up to the year 2000. The figures do not include sums for claims for disability not resulting in death, nor do they include persons not asbestos workers who are nevertheless exposed to asbestos. The mortality figures for asbestos workers are derived from Selikoff, Hammond & Seidman, *Mortality Experience of Insulation Workers in the U.S. and Canada, 1943-1976*, 330 Annals N.Y. Acad. Sci. 91 (1979); Hogan & Hoel, *Estimated Cancer Risk Associated With Occupational Asbestos Exposure*, 1 Risk Analysis No. 167 (March, 1981).

The probability of a claim arising from an asbestos-related death is based upon projections of data developed by Barth, *Compensation for Asbestos-Associated Disease: A Survey of Asbestos Insulation Workers in The U.S. and Canada* (unpublished study for the U.S. Dep't of Labor) (1981); Employment Standards Admin., U.S. Dep't of Labor, *Black Lung Benefits Act, Annual Report on Administration of the Act During Calendar Year 1979* (1980). The average amount of liability for each such death is based upon Proceedings of the World Health Organization Expert Committee on Cancer Statistics (June, 1978); Sciotto & Chiazze, *Cancer Prevalence and Hospital Payments*, 59 J. Nat'l Cancer Inst. 345 (1977); Johnson & Heller, *The Economic Consequences of Asbestos-Associated Occupational Disease* (unpublished study for the U.S. Dep't of Labor) (1981).

In *Keene* the D.C. Circuit adopted the position that only the insurer or insurers within the D.C. Circuit's dragnet should be responsible for compensating claims for asbestos-related disease. Yet the financial reality is that the combined assets of insurers added to those of the asbestos industry could not satisfy the anticipated claims for deaths of asbestos workers alone, putting aside claims for others not directly working with asbestos or suffering injury that does not result in death. The compensation goal of the D.C. Circuit avails little if there exist no financial means sufficient to accomplish it.

2. *Only The Involvement of Additional Public and Private Resources in This National Health Problem Can Achieve The Result Sought by The D.C. Circuit.*

Principal among the goals of the D.C. Circuit was affording insurance protection to the asbestos industry in order to ensure compensation to victims of asbestos-related diseases. The D.C. Circuit attempted to achieve its social solution by construing straightforward policy language to enlarge insurer liability beyond that which these insurers and insured reasonably expected when the insurance was written. Yet the financial impossibiilty of the court's conclusion recalls the comment of Judge Keith, writing for the majority in *Forty-Eight*: "[W]e have this *impossible* problem before us. There is no truly satisfactory solution we can make. Each theory has its flaws and anomalies." [11]

A review of the decisions of the Fifth, Sixth, and D.C. Circuits and the Massachusetts District Court make it clear that resolution of the asbestos problem transcends the issues of insurance contract construction, surpasses the combined resources of insurers and the asbestos industry, and requires solutions beyond those this Court, or lower courts, can reach by application of the law to the factual and legal issues as framed by the parties.

Recent and ongoing efforts of Congress show its understanding that the solution to this type of problem must

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[11] 633 F.2d at 1226 (emphasis added).

ultimately involve private, federal, and state resources in addition to those of insurers and asbestos manufacturers. For example, The Asbestos Health Hazards Compensation Act of 1980, S. 284, 96th Cong., 2d Sess. (1980), now being revised for reintroduction in this Congress, proposed minimum standards under which state workers' compensation laws would provide adequate and equitable compensation for asbestos-related disability and death. In states where the workers' compensation laws did not meet these minimum federal standards, the claimant could seek supplemental compensation from his employer, or, through an apportionment mechanism, from other employers or from insurers.[12]

The bills that have been introduced may not themselves solve the asbestos compensation quandary. Read together, however, they point to the appropriateness of a legislative response to issues insurers, industry and claimants cannot resolve satisfactorily in the courts. The Court of Appeals for the Fifth Circuit put it succinctly in *Migues v. Fibreboard Corp., et al.*, No. 80-1994 (5th Cir. Dec. 7, 1981): "Whether through judge-made common law or legislative enactment, there is an urgent need for new approaches to the tragedy of asbestos-related disease." [13]

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[12] Comparable legislative efforts show Congressional recognition that the asbestos health solution must look to parties beyond those in *Keene* and related suits. These include, among others, the Longshoremen's and Harbor Worker's Compensation Act Amendments of 1981, H.R. 2106, 97th Cong., 1st Sess. (1981), that would provide that failure to file a claim within the period prescribed by the law would not bar a compensation claim if such failure was occasioned by mistake or other reasonable cause, or if it is found that the delay has not prejudiced the insurer; the Government Contractors' Products Liability Act of 1981, H.R. 1504, 97th Cong., 1st Sess. (1981), that would provide indemnification to suppliers and their insurers for certain products liability in supplying a product or service to the United States Government; and the Asbestos School Hazard Detection and Control Act of 1979, H.R. 1435, 96th Cong., 1st Sess. (1979), that would establish a program to inspect schools for asbestos materials, provide funds for the testing and evaluation of potential hazards, and create a loan program to assist in the containment or removal of hazards.

[13] 9 Prod. Safety & Liab. Rep. 952, 956 (5th Cir., Dec. 7, 1981).

A suggestion from this Court that it is timely for Congress to intercede, as Congress did in enacting the Black Lung Benefits Act, Pub. L. 91-173, 30 U.S.C. § 901 *et seq.*, would greatly advance the solution all of the parties should seek.

B. The District of Columbia Circuit Erred In Construing the Contract by Exclusive Reference to The Asserted Intent of One Contracting Party.

1. *The Contract of Adhesion Analysis is Inapplicable Where The Contracting Parties Enjoy Coequal Bargaining Status.*

By its conclusory statement that the policies at issue have a "dominant purpose of indemnity," Pet. App. A at 12a, the D.C. Circuit demonstrated that it was concerned primarily with securing prompt and equitable compensation for claimants. In its pursuit of this laudable public policy objective, however, the court was confined by the contract provisions and the parties before it. To accomplish the result it desired, the court elected, without any record evidence to support its choice, to apply contract principles wholly unsuited to the interpretation of insurance policies between major manufacturers and their insurers. Commercial Union submits that neither the D.C. Circuit nor any federal court should attempt to solve such problems of national scope by rewriting the insurance policies entered between the parties.

Casting aside established principles of insurance contract interpretation, the D.C. Circuit's construction of the insurance contract takes into account only "the reasonable expectations of Keene. Pet. App. A at 13a n.12.[14]

[14] The court's construction was the subject of several Petitions for Rehearing, including that of *amicus curiae* Commercial Union. On December 21, 1981, the court *sua sponte* deleted this language and inserted "the expectations that Keene could have reasonably formed, as an objective matter, on the basis of the policies' language." Order filed December 12, 1981. This amendment contravenes the prerequisites for amending an opinion. *Dilly v. Alexander*, 627 F.2d 407, 410-12 (D.C. Cir. 1980). Moreover, this revision cannot be reconciled with the court's earlier interpretation of the policy provision as consistent with "the reasonable expectations

In support of its radical analysis, the court characterized these insurance policies as "contract[s] of adhesion," and cited Keeton, *Insurance Law Rights at Variance With Policy Provisions*, 83 Harv. L. Rev. 961, 967 (1970). Pet. App. A at 13a, n.12.

Here the Court of Appeals clearly erred. Professor Keeton explicitly confined his conclusions to contracts "under which the insured is left little choice beyond electing among standardized provisions offered to him. . . ." 83 Harv. L. Rev. at 966, such as home or automobile owner policies, in which there exists no bargaining parity between the parties and the insured can either take it or leave it. The bargaining inequality Professor Keeton noted does not exist in the execution of liability insurance contracts between major manufacturers and their insurers generally, and between Keene and its insurers in particular. Keene is a substantial corporation with 1979 net revenue in excess of $200 million. A manufacturer of this size many incur annual liability insurance premiums of two to three million dollars. Negotiation of such contracts, involving substantial financial responsibility for both parties, includes bargained-for changes in contract language and the addition of riders expanding or constricting coverage pursuant to the insureds' wishes. Working through brokers representing the insured, and with the assistance of legal counsel, large manufacturers are able to, and do, negotiate scope of coverage, deductibles, premiums, foreign coverage, and means of loss-prevention, to name only a few.

In addition, there exists great cross-elasticity among the type, scope and cost of insurance policies offered by insurers. Consistent with this, over the thirteen-year period from 1961 to 1974, Keene itself renegotiated its insurance contract eight times with four different insurers. Pet. App. A at 37a-41a. There is simply no similarity between the arms-length bargaining process by which

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of Keene when it purchased the policies," Pet. App. A at 12a, and fails to reveal its basis for its conclusion. *See Kelly v. Everglades Drainage District*, 319 U.S. 415, 422 (1943).

substantial manufacturers such as Keene secure insurance coverage and the contract of adhesion analysis adopted by the D.C. Circuit.

Where both the insurer and the insured enjoy equal bargaining power, as did Keene and its insurers, courts must construe the policy with reference to the legitimate expectations of both parties. *E.g., National Hills Shopping Center, Inc. v. Liberty Mutual Insurance Co.*, 551 F.2d 655 (5th Cir. 1977). Other courts evaluating comparable insurance contract construction questions have held that a policy of favoring the insured's interpretation is inapplicable where both the insurer and the insured are commercial coequals. For example, in *Eagle Leasing Corp. v. Hartford Fire Insurance Co.*, 540 F.2d 1257 (5th Cir. 1976), the parties contested the meaning of the insurance provision "during the currency of this policy." Rejecting the "legal platitude" that insurance policies should be construed against the insurer where both insurer and insured were "each advised by competent counsel and informed experts," the Fifth Circuit concluded:

> We do not feel compelled to apply, or, indeed, justified in applying the general rule that an insurance policy is construed against the insurer in the commercial insurance field when the insured is not an innocent but a corporation of immense size, carrying insurance with annual premiums in six figures, managed by sophisticated business men, and represented by counsel on the same professional level as the counsel for insurers. *In substance the authorship of the policy is attributable to both parties alike.*[15]

[15] 540 F.2d at 1261 (emphasis added) (citations omitted). The Court of Appeals added, at *id.*:

> It is true, of course, as the trial judge observed, "scriveners of insurance policies are acutely aware of the meaning and effect of the language." We comment: So too, are counsel for large companies carrying fleet insurance with annual premiums in six figures. There is no purpose in following a legal platitude that has no realistic application to a contract confected by a large corporation and a large insurance company each advised by competent counsel and informed experts.

The same analysis governs even where the insured maintains that the contract language is ambiguous. Although Commercial Union believes the policy language to be clear on its face in requiring the manifestation interpretation, arguable ambiguity still requires reference to the intent of both parties where insurer and insured negotiate the contract at arm's length. To the insured's argument that loss of business policy language was ambiguous and that the policy should be construed against the insurer, the Third Circuit in *Eastern Associated Coal Corp. v. Aetna Casualty & Surety Co., et al.*, 632 F.2d 1068 (3d Cir. 1980), responded:

> [T]he principle that ambiguities in policies should be strictly construed against the insurer does not control the situation where large corporations, advised by counsel and having equal bargaining power, are the parties to a negotiated policy. *Eastcoast Equipment Co. v. Maryland Cas. Co.*, 38 Pa. D.&C. 2d 499, 511-12, 218 A.2d 91, 98 (Pa. C.P. 1965), *aff'd per curiam on opinion below*, 207 Pa. Super. 383, 218 A.2d 91 (1966); 13 Appleman, Insurance Law and Practice § 7402, at 301 (1976).[16]

2. The Court's Interpretation of the Contract Cannot be Squared With Court-Adopted Principles of Insurance Contract Law and Established Underwriting Principles.

The D.C. Circuit's interpretation of Keene's contractual expectations is premised upon the assumption that these future asbestos-related claims were unknown and unknowable to Keene at the time it purchased insurance. Pet. App. A at 26a. Yet in other suits where prior industry knowledge of asbestos-related claims was at issue, courts have found long-standing industry fa-

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[16] 632 F.2d at 1075. *See Moreira Construction Co. v. Moretrench Corp.*, 97 N.J. Super. 391, 235 A.2d 211, 213 (App. Div. 1967) (use of standardized lease between lessor and lessee corporations does not require contract of adhesion analysis where there is no showing that plaintiff "was precluded from negotiating a contract on more favorable terms" and "no inequality of bargaining power exists.")

military with the problem.[17] In view of these decisions, the D.C. Circuit erred by lightly assuming that Keene was unfamiliar with potential claims when it purchased its insurance.

In the mid-1960's, many insurers modified the language of their general liability insurance contracts to eliminate policy language under which the initiation of coverage turned upon the event of an "accident" resulting in an "injury" during the policy period. Insurers and insureds alike found that the use of the term "accident" left uncertain whether the act or occurrence, or the injury resulting from the act or occurrence, must take place during the policy period. Accordingly, many insurers changed their policy language to substitute the term "occurrence" for "accident," and to provide that a covered "occurrence" could be caused by repeated exposure to "conditions" if such exposure to conditions "results during the policy period in bodily injury."

Keene has argued that this change was intended to make it clear that "exposure" to conditions during the policy period was sufficient to trigger coverage. Quite the contrary, it was common and accepted knowledge throughout the industry that the changes in policy language were specifically intended to provide coverage for only those compensable losses that became manifest during the finite policy period.[18]

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[17] *E.g., Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 896 (1974); *Moran v. Johns-Manville Asbestos Co.*, C. 79-345 (N.D. Ohio 1981) (punitive damages awarded).

[18] As one commentator explained in a 1966 article in the Insurance Counsel Journal:

> Probably the most significant portion of the definition [in the new policies] is the phrase "during the policy period." It will now be required, to bring the policy provisions into play, that the bodily injury or property damage resulted during the policy period and not that the accident resulted during the policy period.

Tarpey, *The New Compensation Policy: Some of the Changes*, 33 Ins. Counsel J. 223, 224 (1966). Another commentator observed

The D.C. Circuit states that it has sought "to interpret these contracts in a manner that is equitable and administratively feasible and that is consistent with insurance principles, insurance law, and the terms of the contracts themselves." Pet. App. A at 11a. Yet the conclusion the court reaches rewrites the contracts entered by the parties and, in so doing, ignores the principles of liability underwriting that have always governed the insuring of risk.

The D.C. Circuit states that "[a]n insurance contract represents an exchange of an uncertain loss for a certain loss," and that adoption of the manifestation approach "would undermine the function of the insurance policies." Pet. App. A at 12a, 21a. In this conclusion the court proceeds in apparent unawareness of underwriting realities and judicially-approved insurance practices. The courts and the commentators are in agreement that liability insurance does not represent insurance against the unknown; rather, the offering and setting of premiums for liability insurance is based upon an actuarial projection of what the insured's overall loss position will be. Insurance is intended to transfer or share an ascertainable risk of loss.[19] For a risk to be insurable it must be "specified or capable of identification," and the "duration of risk should be fixed or determinable."[20] Thus, a risk is insurable only where the

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that the intended and actual result of eliminating the term "accident" from the policies was to make it clear that the damage or loss (*i.e.*, "bodily injury") must occur during the policy period:

> *A Loss Must Occur During the Policy Period*
>
> Any injury or damage which is the subject of a claim must occur during the policy period for coverage to apply. The old policy applied to "accidents" occurring during the policy period. The word "accident" lent itself to debate as to whether it referred to an act or the injury resulted from the act.

Sorensen, *The New Comprehensive General Liability Coverage*, 1966 Ins. L.J. 645, 651-52.

[19] 1 R. Anderson, G. Couch, *Cyclopedia of Insurance Law* § 1:3, at 29 (2d ed. 1959).

[20] *Id.* §§ 2:7, 2:8 at 109-10.

loss produced is definite, the likelihood of loss is calculable and the cost of insuring against the loss is economically feasible.[21]

Insurers, like other companies, operate within a business cycle. For most, at the conclusion of each fiscal year the company weighs its gross income against its expenses, including losses paid out and anticipated, and reports its financial status to the state insurance authority and, where publicly owned, to its shareholders. Mutual companies and publicly-held companies disburse net profits to their owners. The financial condition of the insurer at year's end is a material element in the state's approval of new premium rates. To be able to assess its financial status and to continue to conduct business, *i.e.*, underwrite new policies, the insurer must be able to terminate potential liability on its expired policies. As is recognized by the commentators, the opening and closing of such potential liability historically has been the commencement and termination dates of the respective insurance policies.[22]

The D.C. Circuit's opinion ignores this business practice by telling insurers, in effect, that they are once again on the risk on policies written and by their terms completed many years ago, subjecting insurers to liability from the time a claimant's initial exposure to respirable asbestos and indefinitely thereafter. For most insurers, however, premiums paid in prior policy periods are simply no longer available to be paid out. In most instances they will have been applied to claims during the prior policy period, to new claims, or exhausted in operating expenses or shareholder disbursements. The open-ended liability imposed by *Keene* will make it impossible for insurers to assay their year-end financial positions, and deny State insurance authorities the loss calculations that must form the basis of any new rate approvals.

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[21] *See* R. Mehr, E. Commack, *Principles of Insurance* 36 (1957).

[22] 9 R. Anderson, G. Couch, *Cyclopedia of Insurance Law* § 39:203, at 559 (2d. ed. 1959).

The D.C. Circuit's opinion, it is seen, rewrites the contract between insurer and insured to achieve a policy objective the court considers just. This result is contrary to the principle that an insurer's obligation under a policy of insurance cannot be enlarged or varied by judicial construction. *Treasure Craft Jewelers v. Jefferson Insurance Co. of New York*, 431 F. Supp. 1160, 1163 (E.D. Pa. 1977), *aff'd*, 583 F.2d 650 (3d Cir. 1978); *H.K.H. Co. v. American Mortgage Insurance Co.*, 490 F. Supp. 1201, 1205 (D. Nev. 1980).

C. Under Pertinent State Decisional Law and Growing Medical Evidence, Injury Does Not Occur Until Exposure to Asbestos Produces Clinically Evident Diagnosable Disease.

In its Opinion the D.C. Circuit cast aside its own prior holding that " 'disease'. . . in insurance contracts [is] construed to mean serious, permanent ailments" [23] and a consistent and considerable line of state court decisions. For example, in *American Motorists Ins. Co. v. E.R. Squibb & Sons, Inc.*,[24] involving the chemical DES, the New York Supreme Court for the County of New York construed a policy requiring compensation for "bodily injury . . . caused by an occurrence," a provision similar to those considered herein. The *Squibb* court found that policy language limited coverage "to conditions which result in bodily injury during the policy period" and accordingly held that:

> Coverage is predicated not on the act which might give rise to ultimate liability, but upon the result. It would simply be a strained interpretation to construe the occurrence clause as though it covered "exposure during the policy period which results in bodily injury." [25]

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[23] *Jones v. Reliance Ins. Co.*, 607 F.2d 1, 4 & n. 43 (D.C. Cir. 1979), *citing Johnson v. Metropolitan Life Insurance Co.*, 53 N.J. 423, 251 A.2d 257 (1969).

[24] 95 Misc. 2d 222, 406 N.Y.S.2d 658 (Sup. Ct. 1978).

[25] *Id.* at 223-24, 406 N.Y.S.2d at 659-60.

In an analogous line of health insurance cases, medical evidence gathered after manifestation indicated that the cause of the disease predated its manifestation. The courts nevertheless refused to alter the point at which coverage was legally triggered under the policy—a time uniformly determined to be at first manifestation.[26]

The correctness of these decisions is borne out by current and emerging medical opinion. At oral argument counsel for one party told the panel that "all of the doctors agree that bodily injury occurs substantially before manifestation."[27] A substantial body of medical evidence, both in the record below and presented in ongoing related suits, persuasively counters this contention. While it is perhaps arguable that the initial inhalation of asbestos fibers *affects* the individual, there is simply no showing that the early stages of exposure have an injurious *effect.*

Experts in pulmonary diseases have concluded that due to the human body's metabolic and protective response to asbestos fibers and other foreign bodies, bodily injury does not occur with the early inhalation of airborne asbestos.[28] Most inhalable asbestos fibers do not reach the lungs, but are instead trapped in the mucus-lined baffles of the sinus and nose, or the nose's hair or minute cilia.

Those fibers that do reach the trachea are confronted by an array of chemical and immunological defenses to

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[26] *See, e.g., Cohen v. North American Life & Casualty Co.*, 450 Minn. 507, 185 N.W. 939 (1921); *Reiser v. Metropolitan Life Insurance Co.*, 262 App. Div. 171, 28 N.Y.S.2d 283 (1st Dept. 1941), *aff'd*, 289 N.Y. 561, 43 N.E.2d 534 (1942).

[27] Transcript of June 16, 1981 Oral Argument at 39.

[28] Affidavit of Ronald G. Crystal, M.D., *Keene Corp. v. INA*, Case No. 78-1101 (D.D.C.), Appendix A. Similar evidence by other cardiovascular and pulmonary disease specialists has been offered in *Standard Asbestos Manufacturing & Insulating Co. v. Royal Indemnity Insurance Co.*, No. CV80-14909 (Mo. Cir. Ct., Jackson Co.) (Affidavit of Edward H. Chester, M.D.), Appendix B, and *Zurich Ins. Co. v. Raybestos-Manhattan, Inc.*, No. 78-1-8760 (Ill. Cir. Ct., Cook Co.) (Affidavit of Nicholas D'Esopo, M.D.), Appendix C.

prevent injury or cellular alteration. The same cilia and mucus line the bronchial airways, and constantly operate to clear the airways of foreign particles. Conveyed to the mouth for swallowing or expectoration, ninety-eight percent of asbestos fibers inhaled through the nose never reach the lungs. For those asbestos fibers that do reach the lungs, the body reserves additional protections, including scavanging cells, known as macrophages, that absorb and devour foreign bodies and remove them from vital organs. Significant loss of lung function does not occur until perhaps fifty to one hundred million of the lung's air sacs are involved with asbestos fibers. These protective responses occuring throughout the early stages of exposure to asbestos fibers do not result in any ascertainable bodily injury, much less impairment.[29] These conclusions are supported by the fact that most people who inhale asbestos never develop a clinically significant impairment of function that doctors would define as an asbestos-related disease. *See* n.28, *supra.*

In sum, the contemporary medical understanding is consistent with the conclusions of the decisions cited above: initial and early exposure to respirable asbestos does not represent "injury, sickness, or disease," and "bodily injury" or disease does not occur until the time that tangible symptoms demonstrate impairment of bodily function. Read together with applicable decisional law, as the District Court in *Eagle-Picher* most recently concluded:

> [The medical testimony], combined with the ordinary meaning of the coverage language, leads to the conclusion that exposure to asbestos results in 'personal injury' when it produces clinically evident diagnosable disease, that is, when it becomes manifest. (Pet. App. C at 74a).

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[29] *Commercial Union Ins. Cos. v. Pittsburgh Corning Corp.*, No. 81-2129 (E.D. Pa.) (Affidavit of Ronald G. Crystal, M.D.), Appendix D.

CONCLUSION

For the foregoing reasons, Commercial Union respectfully prays that this Court grant the Insurance Company of North America Petition for a Writ of Certiorari to review the Judgment and Opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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December 30, 1981

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Case No. 78-1011

KEENE CORPORATION,

Plaintiff

v.

INSURANCE COMPANY OF NORTH AMERICA, *et al.*,

Defendants

AFFIDAVIT OF RONALD G. CRYSTAL, M.D.

STATE OF MARYLAND)
) ss:
COUNTY OF MONTGOMERY)

Ronald G. Crystal, M.D., being first duly sworn, states as follows:

1. I am a practicing doctor of medicine specializing in pulmonary disease. I received my M.D. from the University of Pennsylvania School of Medicine in 1968, and took post-graduate training in internal medicine at Massachusetts General Hospital, Boston, Massachusetts. I received further training, with emphasis on pulmonary disease, at the University of California, San Francisco, California, and at the National Institutes of Health, Bethesda, Maryland. I am, and since 1975 have been, Chief of the Pulmonary Branch of the National Heart, Lung & Blood Institute of the National Institutes of Health (NIH). During this time I have been responsible for directing and participating in what I believe is the world's largest medical research program with respect to the pathogenesis, diagnosis, and treatment of various of the so-called interstitial lung diseases. These diseases include an interstitial lung disease known as asbestosis,

which is associated with chronic, excessive exposure to asbestos. In addition to my research responsibilities at NIH, I and my subordinates are responsible on an ongoing basis for the diagnosis and treatment of individuals referred to the National Institutes of Health on account of such diseases, and the diagnosis and treatment of patients with asbestosis.

2. My attention has been directed to the following statement, which has been reported to me as coming from page 6 of a statement of points and authorities in support of plaintiff Keene Corporation's motion for partial summary judgment in the above case: "In connection with asbestos damage claims, bodily injury occurs with the inhalation of asbestos fibers and continues to occur thereafter." This statement is not correct for a number of reasons.

3. The body has a number of defenses which prevent most inhalable asbestos fibers from ever reaching the lungs in the first place. These include the baffles of the sinus and nose, the mucus-lined passage leading from the nose to the functional areas of the lungs, and minute cilia or hairs which trap, and convey back to the mouth for swallowing or expectoration, those foreign substances which are inhaled along with the air one breathes. It is estimated that 98 percent of the asbestos fibers which are inhaled through the nose, therefore, never reach the lungs because of these natural defenses.

4. In addition, even if asbestos fibers reach the lungs' air sacs, the human body has numerous chemical and immunological defenses which can, and do, prevent those fibers from doing any injury to the body, or which repair any temporary cellular alterations which take place on account of those fibers' presence. It is not until these defenses are overwhelmed, either by the quantity of fibers which are inhaled over time, because of breakdowns in the chemical defense mechanisms occasioned

by other causes unrelated to asbestos, or for some other reasons, that the asbestos fibers which reach the air sacs cause any irreversible tissue deterioration, even at the sub-clinical level.

5. It is a virtual certainty that all contemporary dwellers within urban areas have inhaled asbestos fibers into their lungs, but have suffered no measurable lung damage as a result. Such persons remain healthy either because their natural defense and repair mechanisms have successfully neutralized the asbestos fibers, or because any cellular damage which has taken place has been so slight that it is medically insignificant vis a vis the enormous reserve capacity of the human lungs.

6. There is no question but that chronic and excessive exposure to airborne asbestos fibers under some circumstances can cause various lung diseases. Most persons who are exposed to such asbestos, however, never contract illness as a result. Even with those persons who have the highest documented exposure to asbestos fibers, no more than 50 percent ever develop signs of illness. Several epidemiological studies show not only that most persons exposed to asbestos suffer no ill effect, but that they do not even demonstrate any statistically significant decline in pulmonary function.

7. Even with respect to an individual who has asbestosis, it is not correct to postulate that his condition began with his first exposure, or developed proportionately over however many years he was exposed. Individual susceptibility to the effects of asbestos varies greatly from person to person, and also varies in any individual over time. Individuals presenting with asbestosis become ill only if and when their natural defense and repair mechanisms are overwhelmed by the volume of asbestos they encounter. This may be early in an individual patient's history of exposures, or it may be late. It is certainly not correct, however, to say that every

exposure has resulted in injury; indeed, the opposite is generally true.

8. With respect to those forms of cancer associated with asbestos, there is no evidence that these are "cumulative" or "gradual" in the sense of resulting from the sum of the patient's years of exposure. Most people exposed to asbestos never develop cancer. The mechanism by which asbestos fibers may cause cancer is not understood. Uniformly, however, there is a lengthy period after the first exposure before cancer is contracted.

Further affiant sayeth naught.

/s/ Ronald G. Crystal
RONALD G. CRYSTAL, M.D.

Sworn to and subscribed in my presence this 23rd day of June, 1980.

/s/ [Illegible]
Notary Public

APPENDIX B

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI

No. CV80-14909

Docket E

STANDARD ASBESTOS MANUFACTURING
AND INSULATING COMPANY,
Plaintiff,

vs.

ROYAL INDEMNITY INSURANCE COMPANY, *et al,*
Defendants.

AFFIDAVIT OF EDWARD H. CHESTER, M.D.

STATE OF OHIO)
) ss.
COUNTY OF CUYAHOGA)

DR. EDWARD H. CHESTER, first being duly sworn, deposes and states as follows:

1. I am a physician licensed to practice medicine in the State of Ohio and currently practicing in the greater Cleveland, Ohio, area. I received my medical degree in 1956 from New York University, and in the years following I served as an intern and as a resident at Cleveland Metropolitan General Hospital.

2. I have been associated with Case Western Reserve University since 1962 and reached the rank of Professor of Medicine. I am board certified in the speciality of internal medicine and have been since 1964.

3. For twenty two (22) years the focus of my medical practice has been pulmonary medicine, a medical specialty which encompasses the study of the lungs, and

the diagnosis and treatment of diseases of the lung. As such, I am fully familiar with pulmonary diseases related to exposure to asbestos, and I treat patients afflicted with asbestos-related diseases as a part of my medical practice.

4. The pulmonary diseases most commonly associated with asbestos exposure are asbestosis, bronchogenic carcinoma, and mesothelioma. Mesothelioma and bronchogenic carcinoma are malignant diseases; asbestosis is a fibrotic and non-malignant disease.

5. Mesothelioma is a malignant condition of the cells which make up the pleura which covers the lung and lines the chest wall. A mesothelioma does not generally occur until twenty (20) years or more after exposure to asbestos. Because of the symptoms which are displayed shortly after a tumor's inception, mesothelioma is subject to prompt and reliable diagnosis. Mesothelioma is inevitably fatal in a short period of time, and there is no effective treatment.

6. Bronchogenic carcinoma is a generic term for malignancies arising from various cells of the lung, and is commonly referred to as lung cancer. In cases of bronchogenic carcinoma associated with occupational exposure to asbestos, tumor in the lung does not develop with first exposure. Rather, it usually develops after more than fifteen (15) to twenty (20) years of continuing exposure. Once such a tumor develops and becomes symptomatic, it is generally subject to prompt diagnosis. Though treatable, most cases of bronchogenic carcinoma result in death within several years.

7. I have read the affidavit of Dr. Edward A. Gaensler filed in this action, and disagree with his statement therein that each discrete asbestos fiber which is inhaled and which lodges in the body causes bodily injury almost immediately. While it may initiate a process which results in an abnormality, this does not necessarily cause a disabling bodily injury or disabling disease. The

inhalation of a single asbestos fiber is not the equivalent of bodily injury for a number of reasons. The fiber may be expelled by the mucociliary escalator system, and whether it is so expelled varies from individual to individual. One person may have a better working mucociliary escalator than another, who may, for example, by reason of recurrent viral infections, have an impaired mucociliary escalator. One person may handle and retain asbestos particles within his lungs with no resulting disabling disease because of genetic and environmental differences in his immune system in contrast to another person who may not have as effective an immune system. In the one person repeated inhalation and retention of asbestos fibers may never result in a disabling disease, while in the other disabling asbestos-related disease probably will ultimately occur. Thus, even though the asbestos fibers may be retained in the lung and the scarring process may have begun, it is by no means inevitable that the end result will be a disabling disease. The process may simply stop without producing clinically diagnosable disease. In fact, most people living in urban areas are known to have retained asbestos particles in their lungs, with or without scarring, yet have no symptoms or other evidence of interstitial disease related to that asbestos. Neither do they have any apparent industrial or occupational exposure to asbestos, yet under Dr. Gaensler's affidavit, almost the entire population would be considered as having suffered compensable bodily injury, a conclusion which is both unreasonable and unrealistic.

8. In summary, the inhalation of asbestos fibers results in asbestosis or asbestos-related lung disease, and thus in injury, only when there is clinical evidence of departure from normal which can be by the methods available to the physician such as X-rays, pulmonary function tests, or physical examination, together with the patient's description of symptoms. The mere fact that

an inhaled asbestos fiber activates the macrophages present in the lungs as part of the normal defensive mechanism of the lungs does not constitute a bodily injury. The inhalation of particulate matter, either organic or inorganic, is a normal, daily experience of all of us in living with our environment and dealing with inhaled substances which produces activation of the lung defense mechanisms and is a normal, usual condition of living.

/s/ Edward H. Chester, M.D.
EDWARD H. CHESTER, M.D.

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for said County and State, this 14 day of September, 1981.

/s/ J. C. Rini
Notary Public
My Commission Expires:
Nov. 29, 1983

[SEAL]

APPENDIX C

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

No. 78 L 8760

ZURICH INSURANCE COMPANY,
Plaintiff,
and
NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY,
Intervening Plaintiff,

v.

RAYBESTOS-MANHATTAN, INC.,
FEDERAL INSURANCE COMPANY and
COMMERCIAL UNION INSURANCE CO.,
Defendants.

AFFIDAVIT
OF NICHOLAS D. D'ESOPO, M.D.

STATE OF CONNECTICUT)
) ss
COUNTY OF NEW HAVEN)

NICHOLAS D. D'ESOPO, MD., being first sworn under oath deposes and says as follows:

1. I am presently Chief of the Pulmonary Section at the Veteran's Administration Hospital, West Haven, Connecticut, Professor of Clinical Medicine at Yale Medical School, New Haven, Connecticut. I am a member of a number of medical societies, committees and boards, many of which involve pulmonary medicine. I received my Medical Doctor degree from Yale University in 1936. I am a Diplomate of the National Board of Medical Examiners and am licensed to practice medicine in the State of New York.

2. My professional responsibilities include the diagnosis and treatment of individuals who have contracted various pulmonary diseases causally-related to the inhalation of asbestos fibers. These diseases include asbestosis, mesothelioma and bronchogenic carcinoma.

3. I am familiar with various medical research and studies relative to the manner in which the inhalation of asbestos fibers may cause the diseases of asbestosis, mesothelioma and bronchogenic carcinoma.

4. When asbestos fibers are inhaled, some of these fibers will lodge in the lungs, causing a certain cellular or histological, response. This response of lung tissue may result in a certain scarring, or fibrosis, in the lung, but it is not synonymous with "bodily injury" as that term is defined in common medical usage.

5. Many tissues within the body contain asbestos fibers, but not every such tissue reacts to asbestos fibers. Not every individual who inhales asbestos fibers will ultimately contract the diseases of asbestosis, mesothelioma or bronchogenic carcinoma. Whether a particular individual will contract any such diseases is determined by a number of variables, including the degree and length of exposure to asbestos fibers, the individual's immunological system and the inhalation of other deleterious substances that may act synergistically with asbestos fibers.

6. Disease is medically understood as a condition which interferes with the normal functioning of the body. A "scar" of fibrosis in the lungs is neither an injury to the lungs (as this term is usually understood) nor a disease of the lungs. Rather, it is the response of the lung tissue to the inhalation of some foreign substance. Each such "scar" that is caused by an individual asbestos fiber does not progress to cause impairment of pulmonary function. Pulmonary function is impaired only by a quantitative accumulation of such fibrosis over a period of time that averages two to four decades.

Fibrosis occurring after only several years of inhalation will not generally progress to pulmonary asbestosis without further exposure to asbestos fiber.

7. Fibrosis that occurs within the lungs may, but not necessarily, ultimately result in the disease "asbestosis". The disease "asbestosis" requires the accumulation of scar tissue due to repeated inhalation of asbestos fibers over an extended period of time. The pre-asbestosis fibrosis that is formed within the lungs does not compromise normal pulmonary or respiratory function unless it is added to by repeated inhalation of additional asbestos fibers over an extended period of time. An individual who has inhaled asbestos fibers will not have contracted the disease "asbestosis" until such time as he has exhibited the various signs or symptoms of the disease, or has been clincially diagnosed as having contracted such disease.

8. Mesothelioma is a carcinoma of the pleura and/or peritoneum that is causally-related to the inhalation of asbestos fibers. The fibers that are inhaled cause a cellular or histological response to body tissue that is not synonymous with bodily injury, but that may ultimately result in the disease. Mesothelioma does not occur until one or more cells become transmuted into carcinoma cells. Mesothelioma may be related to a short exposure to asbestos fibers, rather than to a cumulation of fibers.

9. Bronchogenic carcinoma is a carcinoma of the lungs that is causally-related to the inhalation of asbestos fibers and/or cigarette tobacco smoke. The fibers that are inhaled cause a cellular or histological response to body tissue that is not synonymous with bodily injury, but which may ultimately result in the disease. Bronchogenic carcinoma does not occur until one or more cells become transmuted into carcinoma cells. Bronchogenic carcinoma may be related to a short exposure to asbestos fibers, rather than a cumulation of fibers.

10. The term "bodily injury" as it is medically understood refers to trauma. The diseases of asbestosis, mesothelioma and bronchogenic carcinoma are not traumas, but are diseased conditions of the lungs that result, in part, from the response of lung tissue to the inhalation of asbestos fibers.

11. The cellular or histological response of lung tissue to a specific and individual asbestos fiber is not bodily injury and is not disease as those terms are medically understood. To state that each inhaled asbestos fiber causes a bodily injury would be to use that term in a peculiar and contrived manner.

FURTHER AFFIANT SAYETH NOT.

/s/ Nicholas D. D'Esopo, M.D.
NICHOLAS D. D'ESOPO, M.D.

Subscribed and sworn to before me this 27th day of August, 1981.

/s/ Virginia M. Boucher
Notary Public

My Commission Expires March 31, 1982

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT

No. 81-2129

Docket E

COMMERCIAL UNION INSURANCE COMPANY,
Plaintiff,

vs.

PITTSBURGH CORNING CORPORATION, PPG INDUSTRIES, INC., CORNING GLASSWORKS, TRAVELERS INDEMNITY COMPANY, INSURANCE COMPANY OF NORTH AMERICA, AND LUMBERMENS MUTUAL CASUALTY CORPORATION,
Defendant.

AFFIDAVIT OF RONALD G. CRYSTAL, M.D.

STATE OF MARYLAND)
) ss.
COUNTY OF MONTGOMERY)

DOCTOR RONALD G. CRYSTAL, first being duly sworn, deposes and states as follows:

I am a practicing physician at the National Institutes of Health in Bethesda, Maryland. I went to medical school at the University of Pennsylvania, graduating in 1968. I did post-graudate training in internal medicine at Massachusetts General Hospital in Boston, Massachusetts. I did additional training in the subspeciality of pulmonary disease at the University of California in San Francisco. I am board-certified both in internal medicine and in subspeciality of pulmonary medicine. Since 1975, I have been Chief of the Pulmonary Branch of the National Heart, Lung & Blood Institute of the National Institutes of Health. In addition, I am adjunct

professor of genetics at George Washington University Medical School in Washington, D.C. At the National Institutes of Health, as Chief of the Pulmonary Branch, I direct research in both basic and clinical areas specifically related to the interstitial lung diseases.

For the past six years I direct that which I believe to be the largest research group in the world concerned with these interstitial lung diseases. An example of these types of diseases is asbestosis. Over the last several years, I have published more than 125 journal articles and book articles concerning a variety of topics specifically directed at interstitial lung disease. This is my Curriculum Vitae and it contains information concerning my background as well as my bibliography and I will submit that with my affidavit. Included among my bibliography are several large review articles concerned with the interstitial lung diseases, several of which are 100 pages in length or more.

In addition to the basic research program that I direct at the National Institutes of Health I also have an active clinical practice at the National Institutes of Health where we are referred patients from throughout the country with the interstitial lung disorders including patients with asbestosis. As such, I consider myself to be up-to-date concerning the clinical practice relating to diagnosis, evaluation, testing and therapy of the asbestos-related disorders.

I am a Commissioned Officer in the Public Health Service. I have a rank of Medical Director which is equivalent to that of a Navy Captain.

I am licensed to practice medicine in both Massachusetts and in California.

I am a member of several medical societies including The American Thoracic Society, The American Society for Clinical Investigation, The American Society for Clinical Research, The American Society of Biological

Chemists. In addition, I am a member of Alpha Omega Alpha, the honorary medical school society. I am on the editorial board of several prestigious medical journals including The Journal of Applied Physiology (with particular relevance to the lung), The Journal of Clinical Investigation, Experimental Lung Research and The American Journal of Medcine. I am invited to lecture throughout this country and I have addressed many medical societies throughout the world.

I am here today in a private capacity as a physician and not in my role with the United States Government. The opinions that I am expressing are my own alone and do not in any way represent the National Institutes of Health or the United States Government.

I have read most of the medical literature applicable to asbestos-related disease and I have read the medical testimony submitted to the courts relevant to this case. In my opinion, the medical issues have been grossly misstated and have led to distortions and to speculations. The medical conclusions which have been relied upon by most of the courts to date are not consistent with the everyday use of certain common terms Indeed, they are not consistent with the known and observable medical significance of asbestos inhalation. The principal conclusions relied upon by the courts to date are as follows: First, that inhalation of a single asbestos fiber produces an injury which is an "injury" in the common, everyday sense of the word. Second, that asbestos-related diseases are the sum total of a series of insults which occur contemporaneously with exposure to an asbestos environment. And third that exposure alone to asbestos causes injury to an individual.

These conclusions are simply incorrect. I base this statement upon medical understanding of the pulmonary system and the body defense mechanisms, the nature of asbestos-related disease and the diagnostic tests available today.

Let me explain.

How the lungs function is important in understanding how the body handles asbestos fibers when they are inhaled. Basically, the respiratory system is designed to bring air in contact with the blood for the purpose of gas exchange: oxygen goes from the air to the blood, while carbon dioxide goes in the opposite way, that is from the blood to the air. I have a drawing which demonstrates the anatomy of the lungs. This anatomy is very important in understanding asbestos-related diseases. Air is inhaled through a progressively branching conducting system of tubes (which I'll refer to as the airways or bronchi). These airways, which are very long, end in clusters of microscopic air sacs called alveoli. The walls of the alveoli are very thin. They are lined with a layer only one cell thick. The alveoli contain capillaries which bring under-oxygenated blood laden with carbon dioxide into intimate contact with the air. The alveoli have minimal fibrous tissues for support along with elastic fibers which allows for expansion and contraction. There is tremendous redundancy in the lung. The adult human lung has approximately 300 million alveoli, less than half of which are actually needed in everyday life.

Most of the system is enclosed within a semirigid cage of chest wall which operates like a bellows mechanism. The chest wall is endowed with muscles which, on contraction, expand the chest cage: this action exerts a negative pressure on the lungs causing them to expand also. The system is separated from the abdomen by large flat muscles, called the diaphragms, which on contraction also expand the lungs like a piston being pulled out of a barrel.

The lungs are encased in a double layer of thin tissue called pleura, the two layers being lubricated by a thin layer of fluid which eliminates friction between the lungs and surrounding structures during expansion and contraction of the chest cage.

I have reviewed the Court's decisions in INA vs. Forty-Eight Insulations, Inc. from the Sixth Circuit, as well as the Porter case from the Fifth Circuit and the Keene case from the D.C. Circuit. They operated under the misconception that the inhalation of an asbestos fiber is bodily injury.

This simply is not so. Bodily injury does not occur with the inhalation of asbestos fibers for a number of reasons. I will try to explain these reasons and I will use an analogy to explain how asbestos-related disease only occurs, and therefore can only be diagnosed, when there is impairment of pulmonary function—that is, when the lungs don't work as well as normal lungs.

The body has an arsenal of defense mechanisms which prevent most inhaled asbestos fibers from ever reaching the lungs in the first place. Only a fraction of the total number of foreign particles which a person inhales ever reach the functional areas of the lung, and that fraction that does arrive in the functional area there, in the functional area thereafter either is removed from the lungs or is acted upon by bodily defenses to prevent irritation of the lung itself.

The first and basic defense mechanisms are the hairs at the opening of the nasal passages. These hairs effectively filter large foreign particles from the inhaled air supply long before they ever get down to the functional area of the lung. Additionally, a mucous lining along the airways from the nasal passages through the trachea and far into the bronchial tree prevents most foreign particles which pass the nasal hairs from reaching the functional area of the lung. The effectiveness of the mucous lining in capturing inhaled foreign particles is enhanced by the branching of the airway and the narrowing of the air passages as they branch and finally reach the air sacs in the lower respiratory tract.

Once captured by the mucous carpet, foreign particles are moved upward toward the trachea to be disposed of

by expectoration or by swallowing. The mechanisms which transport particles outward to the trachea are tiny finger-like projections which line the airways and are known as cilia. The cilia move regularly and systematically, and incessantly clear the airways of foreign particles. The cilia, together with the mucous carpet, have often been described as a moving escalator.

Cilia extend for almost the entire length of the bronchial tree, terminating only at the respiratory bronchioles and the alveoli, down at the functional area of the lung. Because of this natural body defense, it is estimated that the vast majority of asbestos fibers which are inhaled through the nose never reach the lower respiratory tract.

Even when an asbestos particle reaches the functional area of a lung, and cannot be returned to the trachea via the mucociliary escalator, it can be removed from the lungs by other means. Scavenging cells, known as macrophages, are scattered throughout the body, including the lung. Their purpose is to absorb and devour foreign particles and remove them from vital organs. This is an additional defense and it is designed to shield us from harm from our environment. Thus, inhaled asbestos particles are, for the most part, either propelled out of the lungs by protective clearing mechanisms or safely shielded by the protective cells—these macrophages.

Further changes may occur in some individuals after the macrophage ingests an asbestos particle. Through a sequence of events, there can be local inflammation in the air sac. This can be followed by thickening of the wall of the air sac. The process is commonly called scarring or fibrosis. It is not until a large number of air sacs are involved, however, probably more than 50 or 100 million, that the individual will have a significant loss in lung function. Macrophages respond to inhaled asbestos fibers which avoid the body's initial defense mechanisms and reach the alveoli. If the stimulus con-

tinues, additional cells, called lymphocytes and neutrophils, are also summoned, and the continued presence of these cells is called an alveolitis which is an inflammation of the air sacs. If this entire process does continue, the alveolitis may become chronic and may prompt the recruitment of additional cells, called fibroblasts, which may in turn produce connective tissue in the interstitium, or middle, of the air sacs. It is only at this point a minute thickening or scarring or fibrosis may or may not begin to develop.

This microscopic occurrance does not constitute a bodily injury, in its common, everyday terminology, since the lungs continue to function normally. Medically, bodily injury is a term normally reserved for traumatic events; for example a broken leg, or a cut or a bruise. Nor is this microscopic scarring a sickness or a disease per se. Rather, this tiny cellular response is merely a consequence of a protective mechanism by which the body reacts to a foreign substance. There is certainly no impairment to the pulmonary system at that point.

I can say for certain that nearly every person who has ever lived in a city, myself included, has inhaled asbestos fibers into his or her lungs but has no measurable lung damage as a result. We all remain healthy, either because our natural defense mechanisms have successfully neutralized the asbestos fibers, or because any cellular response in the air sacs to the foreign body which has taken place is so slight that it is medically insignificant in view of the enormous number of of air sacs in our lungs. To say that every urban dweller has legally compensable bodily injury because of the mere inhalation of asbestos fibers would be medically unreasonable, unrealistic and wrong because he has no impairment of function or disease.

There is no question but that long-term, or chronic inhalation of asbestos fibers in the air can sometimes cause various lung diseases. However, most people who

inhale asbestos never wind up having any resulting disease. Even when an individual has had a high documented inhalation of asbestos fibers, he will not necessarily ever develop clinically significant impairment of function that doctors would define as an asbestos-related disease. Several studies about the causes of these diseases demonstrate that most people who inhale asbestos show no ill effects, and do not even have a statistical decline in pulmonary function. In other words, most peoples' lungs work just as well after they have inhaled asbestos fibers as before. In this context, since asbestosis does not exist until there is a measurable impairment of a person's lungs to function as well as they did before, and since inhalation is not synonymous with disease, it is incorrect to say that a person's disease began with his first exposure to asbestos fibers.

Even those persons who do retain asbestos fibers within their lungs may not develop disabling disease because of genetic and acquired factors in their lung defense system. In contrast, other individuals may not have effective defenses. In those persons in whom defenses remain effective, repeated inhalation and retention of asbestos fibers may never result in disabling disease, while in other persons, once the defenses fail, disabling asbestosis may occur, ultimately. Thus, even though the asbestos fiber may be retained in the lungs, it is by no means inevitable that those persons will have a disabling disease or impaired pulmonary function.

It is unclear as to why one person's bodily defenses breaks down over time whereas another person's may handle and retain asbestos fibers within his lungs with no resulting disabling disease. But it is clear that the mere inhalation of fibers is not a bodily injury in the way people normally think of bodily injury.

Thus far we have explained the errors in testimony that inhalation necessarily produces injury. It must be understood that there are six steps, all of which must

occur before we have an impairment which constitute the disease asbestosis. In setting forth these six steps, it must be realized that all must occur before the process becomes clinically significant and we define it as asbestosis.

First, asbestos must enter the alveoli, and this may or may not occur. Second, asbestos must remain in the alveoli, and this may or may not occur. Third, alveolar inflammation must ensue, and this may or may not occur. Fourth, the alveolar inflammation must progress to fibrosis, and this may or may not occur. Fifth, fibrosis must progress to the point of impairment of function of the alveolus in which it takes place, and this, too, may or may not occur. And six, enough alveoli must be involved before the impairment becomes clinically significant, and this may or may not occur.

Another point must be emphasized. Each of these six steps may or may not occur even in individuals who inhale large amounts of asbestos fibers over long periods of time. Although many individuals have had heavy exposure for long periods, their defenses prevent advancement past the earliest stages. It probably takes some threshold amount of asbestos particles in the lung, and this is variable from individual to individual, before the five earlier steps occur with sufficient intensity to move towards stage six which is the functional impairment or disease. A person has an asbestos-related disease only if and when the body's defense mechanism either breaks down or is overwhelmed. There is no clinical manifestation of an asbestos-related disease until the body defenses break down thereby leading to impairment.

In short, exposure to asbestos initially marshalls protective, not injurious, bodily responses. Some amount of time necessarily must pass before any thickening or scarring occurs, if at all. Also, there is no inevitability to the process. It may stop simply at any point along the way without producing clinically evident disease. Even

when thickening does occur to a substantial degree, the patient may never have any significant changes in the function of the lungs.

At stage six, clinically significant impairment, we have the disease of asbestosis. In this context asbestosis is a non-malignant fibrotic disease of the lungs characterized by "scar tissue" in large numbers of air sacs resulting from the inhalation and retention of excessive amounts of asbestos fibers. It occurs only when and if the fibrous tissue which results from each of the steps enumerated become so pervasive as to diminish the lung's ability to function normally. Clinically, therefore, asbestosis is simply the functional impairment of the lungs caused by overwhelming of the body's defensive mechanisms by asbestos fibers. It is when this occurs that the individual has the symptom of shortness of breath and has detectable impairment of lung function.

It is important to recognize that asbestosis is not the mere presence of asbestos fibers in the lung. As I said earlier, almost every individual living in an urban area, including judges and lawyers, have inhaled asbestos and have asbestos fibers in their lungs, all in varying degrees, but probably none has the disease asbestosis.

The lungs are protected by the macrophages and by the sequestering of asbestos fibers. The response of the macrophages to the asbestos fibers is the normal defense mechanism of the lung to foreign objects. The disease of asbestosis does not occur at the point in time of this normal cellular response.

The stages which precede the development of clinically significant fibrosis, which is step six, does not constitute disease just as the presence of asbestos fibers in the lungs does not constitute disease but merely indicates inhalation of asbestos. An activated macrophage is not a damaged cell. The existence of lymphocytes and neutrophils is not a disease per se. They are the microscopic

soldiers which are the principal actors in the body's basic defense mechanisms.

Again, let me emphasize that each individual's body can withstand a certain level, or threshold, of asbestos fibers. Only after this threshold has been exceeded are the various steps initiated that may lead to scarring. Whether or not an individual's threshold may ever be exceeded depends upon a number of factors including the duration of inhalation, the amount of asbestos in the occupational environment, whether or not the worker used a respirator, and the efficiency of an individual's defense system.

Perhaps an analogy would be useful to understand why the exposure to asbestos fibers is not the same thing as having a bodily injury. Think about exposure to the sun and sun-tanning and skin cancer. Almost everybody is exposed to the sun's rays. Over a period of time, the body's response to this exposure may or may not be for the skin to get darker or to get sunburned. Some people never burn or tan. Over a much longer period of time, some people may or may not develop patches of skin cancer due, it is currently believed, to the prolonged exposure of the skin to the sun's rays.

Only in that point that a person has skin cancer, can we say that the person has a disease due to prolonged exposure of the skin to the sun. But we cannot say that everybody who has been exposed to the sun's rays has a disease or will ever get one. Nor can we say that people who have been exposed a few times to the sun are very likely to get skin cancer. All we can say for sure is that some peoples' skin defense mechanisms will or may break down over a long period of exposure to the sun and that this person may thereafter have a diagnosable disease, namely skin cancer.

This analogy helps to explain when disease occurs. Certainly a person whose skin has become darker is in no way diseased. Moreover, a person, who at age 55, has

diagnosable skin cancer, was not injured in any sense when he or she spent summers at the beach as a child. As in asbestos-related diseases, the disease can only be said to occur once the body demonstrates that its normal functions have somehow been impaired. The diagnosis of skin cancer, at whatever in point in in time that diagnosis can be clinically made is the first time the sunbather has a disease.

We discussed the steps which the lungs must undergo before the patient may develop a clinically significant impairment of function. From a diagnostic standpoint we have available a variety of specific tests to document the degree of impairment. Impairment in function can be clinically measured and evaluated. There is no speculation, no guesswork in this aspect of the disease asbestosis. However, to date, there is no test, no standard of measurement, which can equate, for an individual, an amount of asbestos inhalation with the danger of functional impairment. Just knowing that someone has inhaled asbestos does not tell us that he or she will get the disease asbestosis. In my medical opinion, it is speculation and mere conjecture, at best, to say that just because a person has been exposed to asbestos, that he or she will ever have a resulting disease. In the context of the developmental steps of asbestosis that I have just discussed, it is speculation as to what steps, if any, an individual who has worked in asbestos environment will reach.

So far, I have been discussing asbestosis, a non-malignant disease. There are two other commonly recognized asbestos-related diseases. Mesothelioma and bronchogenic carcinoma, which is commonly known as lung cancer, are malignant pulmonary diseases. While the mechanisms through which each malignant disease develops is not always clear, it is clear that these diseases are linked medically with the ultimate breakdown of the body's natural defense mechanisms.

Mesothelioma is a malignant condition of the mesothelial cells which line the chest wall and surround the heart, lungs and other organs of the body cavity. These cells provide a buffer between the lungs and the other tissues of the body and they permit each lung to move freely and smoothly.

Mesothelioma is a relatively rare malignancy even among asbestos workers and generally does not occur until many years after the inhalation of asbestos or possibly other substances. Prior to the development of the first malignant cells, there is no way of predicting whether or not a person who has been exposed to asbestos will contract mesothelioma. More importantly, prior to the development of the first cancerous cell, a person does not have a mesothelioma regardless of the extent of their inhalation of asbestos.

Bronchogenic carcinoma is a generic term for malignancies arising from various cells of the lung, and is commonly referred to as lung cancer. While little is known about the precise relationships between the development of bronchogenic carcinoma and exposure to asbestos, on the basis of various statistical studies it is generally accepted that such a relationship exists. Its incidence is especially high in individuals who are exposed to asbestos who also smoke cigarettes. Prior to the development of the first malignant cell, the particular individual does not have bronchogenic carcinoma; nor is there any way to predict whether an individual who has inhaled asbestos may ever develop bronchogenic carcinoma.

In conclusion, I obviously cannot elaborate at any great lengths within this short period of time.

I have attempted to show why it is medically unsound to equate a bodily injury, or disease, with each inhalation of asbestos fibers, or even with many inhalations of many fibers. The body's defense mechanisms will, in most in-

stances, prevent asbestos fibers from reaching the functional area of the lungs. Numerous responses must occur before any impairment takes place. These responses were previously set forth in our charts. You will remember that first, the particles must reach the functional areas of the lungs: most do not. Second, they must remain in the alveoli: many do not or they are safely sequestered by macrophages which protect the body from functional injury. Third, they must establish an inflammatory response; an occurrence which may vary markedly from individual to individual. And fourth, the inflammation must progress to fibrosis or scarring. Fifth, fibrosis within each alveolus must be sufficiently extensive to impair the operation of that functional unit. Finally, sufficient numbers of the 300 million alveoli that are normally present in the lungs must be damaged for clinical disease to be manifest.

The complexity of this process, the necessity of each sequential occurrence, the lack of inevitability of any one of them, the wide variation of individual responses, renders totally inappropriate equating inhalation of asbestos to either injury or disease.

The common use of the term "bodily injury" is not medically sound when used to describe the body's response to the inhalation of asbestos fibers. Asbestosis is a disease related to the ultimate breakdown of bodily defenses against large quantities of accumulated asbestos fibers. Normal body responses, not injury, are the usual sequela of asbestos inhalation. Disease is the impairment which results long after early exposure in only those individuals whose defenses fail.

Thank you.

/s/ Ronald G. Crystal, M. D.
RONALD G. CRYSTAL, M. D.

My name is Dale Matthews. I am the video taping supervisor for today. I am self-employed and an independent producer. Today is November 6, 1981, and we are in Bethesda, Maryland.

/s/ Dale Matthews
DALE MATTHEWS

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for said County and State, this 6th day of November, 1981.

/s/ Frieda Shama
Notary Public

My Commission Expires
July 1, 1982

Opposition

Office - Supreme Court, U.S.
FILED
JAN 8 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1012

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

RESPONDENT'S OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF COMMERCIAL UNION INSURANCE COMPANIES

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IN THE

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OCTOBER TERM, 1981

No. 81-1012

INSURANCE COMPANY OF NORTH AMERICA,
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v.

KEENE CORPORATION,
Respondent.

RESPONDENT'S OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF COMMERCIAL UNION INSURANCE COMPANIES

INTRODUCTION

Respondent Keene Corporation ("Keene") submits this brief in opposition to the motion for leave to file brief as *Amicus Curiae* of Commercial Union Insurance Companies ("Commercial Union").

Keene informed the Clerk of the Court on December 18, 1981 that it would not file a brief in opposition to the petition for *certiorari* because (a) the decision below involves insurance coverage for asbestos tort cases under state law and does not present any federal questions whatsoever (*See, Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202 (1938)); and (b) petitions for *certiorari* were denied on December 7, 1981 in two other cases which involved state law questions of insurance coverage for asbestos tort cases. (81-198—*Insurance Company of North America v. Forty-Eight Insulations*, 50 U.S.L.W. 3461;

81-199—*Liberty Mutual Insurance Co. v. Forty-Eight Insulations,* 50 U.S.L.W. 3461; 81-200—*Aetna Casualty and Surety Co. v. Porter,* 50 U.S.L.W. 3460).

Notwithstanding Keene's position that this case clearly does not warrant review, Keene feels obligated to inform the Court that Commercial Union has not been candid with the Court and Keene suggests that Commercial Union's motion seeking leave to file therefore should be denied.

REASONS FOR DENYING THE MOTION

1. Commercial Union has failed to disclose the recent decision in *Commercial Union Insurance Co. v. Pittsburgh Corning Corporation,* No. 81-2129, E.D. Pa., Dec. 4, 1981. The District Court in Commercial Union's own case rejected manifestation as the sole trigger of insurance coverage and instead cited *Keene v. Insurance Co. of North America,* No. 81-1179-82 (D.C. Cir. Oct. 1, 1981), with approval.

The Court also rejected the same argument Commercial Union makes here seeking a rule "requiring courts to balance the economic resources of the parties to insurance contracts" (Slip op. at 9). A copy of the *Pittsburgh Corning* opinion appears in Appendix A.

2. Commercial Union has failed to disclose that it opposed the adoption of a manifestation coverage position, which it proposes here, in *Commercial Union Assurance Company v. Zurich American Insurance Company,* 471 F.Supp. 1011 (S.D. Ala. 1979). Commercial Union advocated in that coverage dispute that coverage should follow the policyholder's legal liability. Among other things, Commercial Union's brief, dated June 17, 1978, stated "that all carriers insuring [the policyholder] over the years in which the Plaintiffs were exposed to the disease are obligated to participate in the defense and possible indemnification in the underlying lawsuits" (at 3).

In a later brief, dated May 17, 1979, Commercial Union asserted that "the coverage provided by the policies in this lawsuit is triggered by the fact of exposure and injury during a policy period" (at 4).

3. Commercial Union has failed to disclose that its practice was to follow the opposite coverage position to that it proposes here. *See* memorandum, dated April 1, 1975, a copy of which appears in Appendix B.

4. Commercial Union has misstated the expectations of the insurance industry regarding the current volume of tort liability cases. An insurance industry participant in the drafting of the standard comprehensive general liability insurance policy form acknowledged in 1966 that " '[e]xperts project that in the next decade products liability litigation will exceed automobile accident cases in our courts' ". Gowan, *Completed Operations and Products Liability Insurance Coverage of the New Comprehensive General Automobile Policy,* American Bar Association Section of Insurance, Negligence and Compensation Law (1966), at 265.

CONCLUSION

For the foregoing reasons, Keene requests that Commercial Union's motion for leave to file a brief as *Amicus Curiae* be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 81-2129

COMMERCIAL UNION INSURANCE COMPANY

v.

PITTSBURGH CORNING CORPORATION, *et al.*

MEMORANDUM

GILES, J. December 4, 1981

I. INTRODUCTION

Numerous lawsuits alleging asbestos-related injuries have been brought against the Pittsburgh Corning Corporation ("Pittsburgh Corning"), a manufacturer of asbestos products. The parties in the instant declaratory judgment action asbestos-product manufacturers, their primary insurers, and their excess insurers. Resolution of certain pending motions for summary judgment will determine which party must bear the expense of defending the thousands of asbestos suits pending against Pittsburgh Corning, and which must pay for any liability incurred.

These important issues are presented by two sets of motions. The first (the "Defense Motions") seeks a declaration whether Pittsburgh Corning's insurance contract with Travelers Indemnity Company ("Travelers") requires the insurer to continue to defend suits even though the monetary limits of its policy are exhausted. The second set (the "Coverage Motions") seeks a declaration whether insurance written by Commercial Union Insurance Company ("Commercial Union")

covers asbestos injuries (1) resulting from exposure to asbestos during the policy period, as opposed to (2) manifesting themselves during the policy period. For the reasons which follow, the court decides that Travelers must continue to defend despite exhaustion of monetary limits, and that Commercial Union's policies apply to injuries resulting from exposure during the policy period.[1]

II. BACKGROUND

The parties to this litigation are the insured, Pittsburgh Corning; its co-owners, PPG Industries, Inc. ("PPG"), and Corning Glass Works ("Corning"); the insured's primary insurance carriers, Travelers Indemnity Company ("Travelers"), Insurance Company of North America ("INA"), and Lumbermans Mutual Casualty Company ("Lumbermans"); and the insured's excess carrier, Commercial Union Insurance Company ("Commercial Union").[2] The case was brought as a declaratory judgment by the excess carrier alleging that the other parties acted to improperly exhaust the primary liability limits, thus prematurely calling on the excess carrier to fulfill its obligations. The insured counterclaimed against the excess carrier,[3] asking for a declaration that the excess coverage covers injuries caused by exposure to asbestos during the policy period. The insured also cross-claims against its primary carrier, Travelers,[4] asking for a declaration that the primary

[1] A brief order, dated October 29, 1981, informed the parties of the results of the motions, and anticipated this memorandum opinion.

[2] The primary insurers cover the insured for liability up to a set sum. Once the primary coverage is exhausted, the excess carrier's coverage takes over.

[3] Pittsburgh Corning is the beneficiary of excess-insurance policies purchased by its parents, PPG and Corning, from Commercial Union. These policies are also in issue.

In addition, the insured seeks attorney fees and costs for the excess carrier's alleged bad-faith failure to perform its duties.

[4] Although this case involves more than one insured and primary carrier, I shall refer to Pittsburgh Corning as the "insured," and to Travelers as the "primary carrier."

insurer owes a continuing duty to defend despite exhaustion of the primary liability limits.[5]

III. DEFENSE MOTIONS

Cross motions for summary judgment require an adjudication of the primary insurer's obligation to defend its insured despite exhaustion of the liability limits. In a motion for partial summary judgment, the insured contends that the insurer must continue to defend asbestos suits, and in a cross-motion, the insurer contends that it has no duty to defend once its liability limits are exhausted.[6]

A. Arguments

1. Insured's Position

The insured cites three bases for a continuing duty to defend: the insurance contract, an agreement among the primary carriers ("Intercompany Agreement"), and equity. First, the insured contends that the contract creates separate duties to indemnify and defend. Arguing that the contact is unambiguous, the insured states that Pennsylvania law and a line of cases starting with *Anchor Casualty Co. v. McCaleb,* 178 F.2d 322, 325 (5th Cir. 1949), support the proposition that the policy creates a continuing duty to defend. Alternatively, if the the policy is ambiguous, it argues that Pennsylvaina law requires construction in favor of the insured, with the same result. Second, the insured relies on the statement in the Intercompany Agreement that cases pending on January 1, 1979, will continue to be handled to their conclusion by the carriers. The insured argues that the Intercompany Agreement

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[5] The insured also demands attorney fees, compensatory damages, and punitive damages for Travelers' refusal to defend. There are also miscellaneous contingent cross-claims between other parties.

[6] The insured, Pittsburgh Corning, is joined in its position by PPG and Corning, as well as the excess insurer, while Travelers is joined by the other primary insurers.

constitutes an enforceable voluntary agreement to defend it. Finally, the insured contends that it would be unfairly prejudiced if its insurer were allowed to withdraw in mid-course from the investigation, administration, and defense of the thousands of outstanding claims against Pittsburgh Corning.

2. Insurer's Position

While claiming that the policy is unambiguous, the insurer, on the other hand, gives it exactly the opposite meaning as the insured. The insurer also relies on a contrary line of case authority, starting with *Lumberman's Mutual Casualty Co. v. McCarthy,* 90 N.H. 320, 8 A.2d 750 (1939). Alternatively, the insured argues that if the policy is ambiguous, Pennsylvania law requires interpretation like that of any other contract—in accord with the objective intent of all parties—and that the parties objectively intended no continuing duty to defend. The insurer points out that the insured was not a party to the Intercompany Agreement, and because the insured is neither an explicit nor intended beneficiary, it cannot enforce that agreement. Finally, the insurer states that it has arranged for an orderly transition of defense to the insured, such that no prejudice would result thereby.

B. Discussion

A motion for summary judgment must be granted if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). The

parties argue, and I agree, that the material facts are undisputed.[7] What remains is to apply Pennsylvania law.[8]

a. *Ambiguous Insurance Policies Under Pennsylvania Law*

A key aspect of Pennsylvania law is the rule that all ambiguities in the policy provisions "must be resolved in favor of the insured." *St. Paul Fire & Marine Insurance Co. v. United States Fire Insurance Co.*, 655 F. 2d 521, 524 (3d Cir. 1981); *accord, e.g., Cohen v. Erie Indemnity Co.*, 432 A.2d 596, 597 (Pa. Super. Ct. 1981). Application of this rule would mean that the insurer here cannot prevail unless the policy is clearly and unambiguously in its favor.

The insurer, however, citing *Brokers Title Co. v. St. Paul Fire & Marine Insurance Co.*, 610 F.2d 1174 (3d Cir. 1979),

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[7] The parties also assume that I have jurisdiction over this claim. The jurisdictional issue merits more concern than the parties have given it, as is shown by Judge Troutman's opinion in AC & S, Inc. v. Aetna Cas. & Sur. Co., 500 F. Supp. 511 (E.D. Pa. 1980) (dismissing as non-justiciable suit asking for declaration that the policy covers asbestos injuries stemming from exposure during the policy period), *appeal docketed*, No. 80-2654 (3d Cir. Nov. 20, 1980), as well as Judge Bazelon's discussion in Keene Corp. v. Insurance Co. of N. Am., No. 81-1179, slip op. at 8-9 (D.C. Cir. Oct. 1, 1981) (similar case is justiciable).

Upon consideration, I agree that I have jurisdiction. There is diversity between the claimants. Like most suits to determine if the insured is required to defend, a declaratory judgment action presents a constitutionally justiciable controversy. *See, e.g.*, 10 C. Wright & A. Miller *Federal Practice and Procedure* § 2760, at 794 n.42 (1973 & Supp. 1980) [hereinafter cited as Wright & Miller]. *See generally id.* §§ 27572760; *see also* Keene Corp., *supra*, slip. op. at 8-9. That an actual controversy exists here is demonstrated by Travelers' withdrawal from the defense of ongoing cases and Pittsburgh Corning's attempt to enjoin that withdrawal. *See* Pittsburgh Corning Corporation's Motion for Preliminary Injunction, filed June 25, 1981. I also note that unlike *AC & S*, the facts of asbestos actions against the insured are irrelevant to the claims here. Thus, because this action does not depend on facts involved in the underlying liability cases, it would be illogical to dismiss this suit as insufficiently specific. Finally, a declaratory judgment will terminate the insecurity to all parties arising from the uncertainty as to who must defend those cases.

[8] The parties agree that Pennsylvania law controls in this diversity action. I also agree because Pennsylvania has the most significant contacts to this case. The key element is that the bulk of activity covered by the policies took place in this state.

contends that it should escape this strict rule. In *Brokers Title*, the Third Circuit held that the rule of strict construction did not govern policy in that case and therefore ordinary contract principles controlled. There, the issue was whether an exclusion clause would be given effect. The normal Pennsylvania rule is that an exclusion is of no effect unless the insurer proves that the effect of the exclusion was explained to the insured. The district court found that the clause had been read to the insured, but its effect was never explained, and he did not understand the meaning of the clause. The insured was himself an insurance broker and president of a title-insurance firm. He had dealt with policies containing exclusions. The parties were "of relatively equal bargaining power." Under these particular facts, the Third Circuit concluded that the strict-construction rule (which would ignore the exclusion) did not apply.

That holding, however, does not allow the insurers here to avoid the strict-construction rule. First, *Brokers Title* treated an unambiguous exclusion; this court confronts a purportedly ambiguous clause having nothing to do with exclusions. This difference is substantive, not formal. It is harsher, and a greater departure from normal contract law, to tell an insurer that favorable unambiguous clauses will be ignored than to tell it that ambiguous clauses will be construed against it. *See, e.g., Restatement (Second) of Contracts* § 206 (1981) (usual contract-interpretation rule is construction of ambiguous terms against drafter). Second, the key aspect of *Brokers Title* is that the insured there, unlike the insured here, was in the insurance business. Thus, if *Brokers Title* applies to ambiguous non-exclusionary clauses, it distinct from this case. The insurers in this case propose a rule requiring courts to balance the economic resources of the parties to insurance contracts. This was not a consideration in *Brokers Title*. Finally, because Pennsylvania courts have applied the strict-construction rule to both consumer and commercial insurance, the balance of economic resources does not create an exception to that rule.

b. *Construction of Defense Clause*

Because the clause at issue in the Defense Motions is (from the insurer's perspective) at best ambiguous, the policy must be

construed in the insured's favor. The ambiguity concerning the insurer's defense obligations is evident from both the policy language and the cases construing similar language.

The relevant policy language reads:

> *With respect to such insurance as is afforded* by this policy, the company [(Travelers)] shall:
> (a) defend *any suit* . . . .
> . . . .
> and the amounts so incurred, except settlements of claims and suits, are payable by the company in addition to the applicable limit of liability of this policy.[9]

The insured maintains this language means that the insurer must defend "any suit" which might give rise to the type of liability to which the policy is directed. The insurer interprets the clause "such insurance as is afforded" to limit defense obligations both by type and amount of coverage. Both interpretations are reasonable and plausible. Therefore, on its face, the policy term must be found ambiguous. *But see McCarthy* cases cited in note 11 *infra*. This finding of ambiguity is borne out by the insurance industry's later redrafting of policies to eliminate the problem posed by the Defense Motions. A typical newer policy says that the insurer "shall not be obligated to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements."[10]

Each party also relies cases construing insurers' defense obligations. The insured cites a line of cases beginning with *American Casualty Co. v. McCaleb*, 178 F.2d 322 (5th Cir. 1950), while the insurer would follow the line represented by

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[9] Comprehensive General Liability Policy, ¶ II, Affidavit of Robert E. Buckley, Exhibit A, (emphasis added.)

[10] 7C J. Appleman, *Insurance Law and Practice* § 4682, at 37 n.62 (Berman ed. 1979) (quoting 1978 Comprehensive General Liability Insurance policy).

Lumberman's Mutual Casualty Co. v. McCarthy, 90 N.H. 320, 8 A.2d 750 (1939).[11]

No case in either line is one that this court is obligated to follow. Only one, *Simmons v. Jeffords*, 260 F. Supp. 641 (E.D. Pa. 1966), interprets Pennsylvania law. Therefore, I shall undertake, as I must, to predict which rule of law would be adopted by the Pennsylvania Supreme Court, and how that rule would apply to this case.

The Pennsylvania decisions relating to an insurer's duty to defend do not offer a firm basis for such a prediction. Those cases, however, restate three guiding principles concerning the relation between an insurer's duty to defend and its duty to indemnify. The first is that the two duties are separate and

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[11] The *McCaleb* line, relied on by the insured, generally holds that to some extent, the insurer must defend although indemnification coverage may be exhausted. The cases are: American Cas. Co. v. Howard, 187 F.2d 322 (4th Cir. 1951); American Cas. Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1950); Simmons v. Jeffords, 260 F.Supp. 641 (E.D. Pa. 1966) (per John W. Lord, J.); National Cas. Co. v. Ins. Co. of N. Am., 230 F.Supp. 617 (N.D. Ohio 1964); Travelers Indem. Co. v. East, 240 So.2d 277 (Miss. 1970); St. Paul Fire & Marine Ins. Co. v. Thompson, 150 Mont. 182, 433 P.2d 795 (1967), *annotated in* 27 A.L.R.3d 1048 (1969); Kosce v. Liberty Mut. Ins. Co., 159 N.J. Super. 340, 387 A.2d 1259 (Super. Ct. Law Div. 1978); American Employers Ins. Co. v. Goble Aircraft Specialties, Inc., 205 Misc. 1066, 131 N.Y.S.2d 393 (Sup. Ct. 1954), *appeal withdrawn*, 1 App. Div. 2d 1008, 154 N.Y.S.2d 835 (1956).

The cases following *McCarthy*, cited by the insurer, each somehow tie exhaustion of the duty to defend to exhaustion of the liability coverage. They are: General Cas. Co. v. Whipple, 328 F.2d 353 (7th Cir. 1964); Denham v. LaSalle-Madison Hotel Co., 168 F.2d 576 (7th Cir.), *cert. denied*, 335 U.S. 871 (1948); Allstate Ins. Co. v. Montgomery Trucking Co., 328 F.Supp. 415 (N.D. Ga. 1971); Commercial Union Ins. Co. v. Adams, 231 F.Supp. 831 (S.D. Ind. 1964); National Union Ins. Co. v. Phoenix Ins. Co., 301 A.2d 222 (D.C. 1973); Liberty Mut. Ins. Co. v. Mead Corp., 219 Ga. 6, 131 S.E.2d 534 (1963); Oda v. Highway Ins. Co., 44 Ill. Ap. 2d 235, 194 N.E.2d 489 (1963); Travelers Indem. Co. v. New Eng. Box Co., 102 N.H. 380, 157 A.2d 765 (1960); Lumbermen's Mut. Cas. Co. v. McCarthy, 90 N.H. 320, 8 A.2d 750 (1939). *See* Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyds of London, 56 Cal. App. 3d 791, 129 Cal. Rptr. 47 (1976).

See generally, e.g., 7C J. Appleman, *supra* note 10, § 4682, at 34-40; Annot. 27 A.L.R.3d 1057 (1969 & supp. 1981).

distinct. *E.g, Gedeon v. State Farm Mutual Automobile Insurance Co.*, 410 Pa. 55, 58-59, 188 A.2d 320, 321-22 (1963); *Brugnoli v. United National Insurance Co.*, 426 A.2d 164, 166 (Pa. Super. Ct. 1981); *Seaboard Industries, Inc. v. Monaco*, 258 Pa. Super. Ct. 170, 179, 392 A.2d 738, 742-43 (1978). The second is that the insurer may have an obligation to defend although it may have no duty to indemnify. *E.g., Gedeon*, 410 Pa. at 58-59, 188 A.2d at 321-22. Where an injury is covered by the policy, the insurer must defend, but if it prevails in the defense, it obviously need not indemnify.

The third principle is that the insurer need not defend a suit "based on a cause of action excluded from the policy coverage." *Seaboard Industries*, 258 Pa. Super. Ct. at 179, 392 A.2d at 743. This principle is sometimes expressed in different language. *E.g., Gedeon*, 410 Pa. at 58, 188 A.2d at 321 (insurer must defend a claim which "may *potentially* come with the coverage of the policy") (emphasis in original); *Seaboard Industries*, 258 Pa. Super. Ct. at 179, 392 A.2d at 743 ("the insurer has a duty to defend until it can confine the claim to a recovery excluded from the scope of the policy"). This principle comes closest to controlling the current case. None of these case, however, is exactly on point, because in each, the only dispute was whether the cause of action was of a type covered by the policy and the policy limit had not been reached.[12]

Another difficulty in applying these decisions stems from the fact that minor differences in case language become significant here. If the defense obligation depends on whether a "cause of action" is excluded from policy coverage, then the duty to defend must be measured against the type of coverage. If, however, the test is whether there *may potentially be a duty to indemnify*, then amount of coverage also becomes critical, for once the policy limit is exhausted, the insured obviously need not indemnify.

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[12] *But cf.* Nichols v. American Cas. Co., 423 Pa. 480, 484 225 A.2d 80, 82 (1966) (when there is a possibility of verdict in excess of liability limit, the most cautious practice for the insurer is to advise insured to secure separate counsel).

Keeping these principles in mind, I predict that Pennsylvania would reject the *McCarthy* cases, *see* note 11 *supra*, and apply the *McCaleb* cases and hold that the insurer must continue to defend after exhaustion of policy limits. First, the *McCarthy*-line holding that the insurer may pay the limit of its policy into court and walk away from defense of cases[13] contradict Pennsylvania law.[14] *See Simmons v. Jeffords*, 260 F. Supp. 641, 642 (E.D. Pa. 1966).

I also am certain that Pennsylvania would follow the *McCaleb* decisions so as to preclude the insurer from abandoning the defense suit pending when policy limits are exhausted by actual settlements or judgments.[15] This result accords with Pennsylvania law because of Pennsylvania's protection of insureds generally, and its rule of strict construction against the insurers, generally.

The insurer attempts to distinguish the *McCaleb* cases on their facts, arguing that they preclude paying the policy limit into court and abandoning the defense, while what has happened here is exhaustion of the liability limits through actual

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[13] *See* Denham v. LaSalle-Madison Hotel Co., 168 F.2d 576, 584 (7th Cir.), *cert. denied*, 335 U.S. 871 (1948).

[14] My reference to *McCarthy* as a "line" of cases, and my characterization of the parties' positions as relying on those lines is an oversimplification. Some of the *McCarthy* cases can be reconciled with some of the *McCaleb* cases. Furthermore, there are numerous distinctions and contradictions within each line. As an example of both these points, *McCarthy* itself contradicts the cases cited in note 13 *supra* in stating that the insurer may not shift the defense burden to the insured merely by paying the policy limit. 8 A.2d at 750.

[15] *See* St. Paul Fire & Marine Ins. Co. v. Thompson, 150 Mont. 182, 433 P.2d 795 (1967) (although tortfeasor's policy limit had been paid to victim as result of a judgment, insurer was obliged to defend subsequent suit for indemnity by joint tortfeasor); Kosce v. Liberty Mut. Ins. Co., 159 N.J. Super. 340, 387 A.2d 1259 (Super. Ct. Law Div. 1978) (insurer obliged to continue defending suit although it paid policy limit in actual settlement); American Employers Ins. Co. v. Goble Aircraft Specialties, Inc., 205 Misc. 1066, 131 N.Y.S.2d 393 (Sup. Ct. 1954) (court refuses to declare that in event of liability exhaustion, insured need not "continue the defense of any action then pending or any new actions thereafter commenced," holding instead that insurer was "obligated to defend any action against the assureds based upon a wrongful death"), *appeal withdrawn*, 1 App. Div. 2d 1008, 154 N.Y.S.2d 835 (1956).

settlements or judgments. Although the insurer correctly characterizes some of the *McCaleb* cases,[16] others go further, requiring the insurer to continue defenses which were under way when the liability limits were exhausted, or even requiring that the insurer defend suits brought after exhaustion. *See* note 15 *supra.*

Another suggested factual distinction is that unlike the *McCaleb* insurers, the insurer here faces infinite defense costs because of the vast number of potential asbestos claimants. This argument has two flaws. First, it confuses the "infinite" with the "indefinite." The possibility of many added lawsuits does not mean that defense costs will be unlimited. In fact, the insurer may compute a rough limit by multiplying the number of workers exposed to asbestos by the cost of defending an average suit. A second flaw in the argument is that the risk of indefinite defense costs faces any insurers. That risk arises from the possibility of large numbers of unsuccessful suits against the insured. Because the insurer will win all of these, the liability limits will never be reached, so it must continue paying for defense.

Finally, the insurer contends that tying defense obligations to liability limits will neatly divide defense responsibilities between primary and excess carriers; by wedding defense duties to policy limits, it would be clear when each insurer (or the insured) must take over. I agree that this is the most sensible way to allocate defense obligation. The court, however, may not impose whatever allocation it thinks best. I am restricted to interpreting the contract. Furthermore, my decision does not preclude a later assignment of defense to the excess carrier. I hold only that the primary insurer owes the insured a duty to defend; I do not decide the priority of defense obligations among the insurers. *Cf. Aetna Casualty & Surety Co. v. Certain Underwriters at Lloyds of London,* 56 Cal. App. 791, 799, 129

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[16] American Cas. Co. v. Howard, 187 F.2d 322 (4th Cir. 1951); American Cas. Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1950); Simmons v. Jeffords, 260 F.Supp. 641 (E.D. Pa. 1966); National Cas Co. v. Ins. Co. of N. Am., 230 F.Supp. 617 (N.D. Ohio 1964); Travelers Indem. Co. v. East, 240 So.2d 277 (Miss. 1970).

Cal. Rptr. 47, 52 (1978) (apportionment of defense costs among primary and excess carriers cannot be made by reference to the primary policy alone); *National Union Insurance Co. v. Phoenix Assurance Co.*, 301 A.2d 222, 225 (D.C. 1973) (primary policy gives no cause of action by excess carrier against primary insurer).

C. *Intercompany Agreement*

The insured also contends that a duty to defend arises from the agreement primary insurers that the defense of all suits pending as of January 1, 1979, would be allocated among the carriers. The insured argues that under *Guy v. Liederbach*, 421 A.2d 333 (Pa. Super. Ct. 1980), and the *Restatement (Second) of Contracts* § 302 (1981), it is an intended beneficiary of the agreement, and therefore can sue to enforce it. The Intercompany Agreement itself states that its purpose is to benefit the primary insurers. The point of the agreement is to avoid the possibility of disputes among the carriers as to who is obliged to defend, and pay for the defense of, pending lawsuits. The insured is neither an explict nor intended beneficiary; its gain is incidental. *See id.* § 302(2). The Intercompany Agreement therefore gives it no rights against the primary carriers. *See id.* § 315.

d. *Equity*

The insured finally contends that the primary carrier must continue to defend because the insured would be prejudiced by the insurers withdrawal from the defense. All parties agree that the law prevents an insurer from prejudicing the insured by the manner of its withdrawal of the defense. The affidavits make clear that the insurer has offered to transfer the defense in an orderly manner. Boiled down, the contention is that the insurer can never transfer the defense of pending and future cases because of their size and number. This is simply not a "prejudicial" transfer which the law forbids.

IV. COVERAGE MOTIONS

In the second set of motions,[17] the insured seeks a declaration that its excess insurance policy requires the insurer, Commercial Union, to indemnify it for liability caused by asbestos exposure during the policy period. The insurer proposes a conflicting interpretation that it must indemnify for asbestos injuries manifested during the policy period, and also submits that the issue is not ripe for summary judgment.

The latter point is troublesome.[18]

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[17] The second set includes the motions filed prior to the order of October 29, 1981, *see* note 1 *supra*, as well as the motions for reconsideration of that order.

[18] In addition, essentially the same jurisdictional problems exist for this claim as for the insured's claim against the primary carrier. *See* note 7 *supra*. For essentially the same reasons, I hold that I have jurisdiction over this claim too. *See id.*

Another potential jurisdiction problem is presented by Commercial Union's appeal from part of the Order of October 29, 1981. *See* note 1 *supra*. This is problematic because the filing of a notice of appeal normally divests the district court of jurisdiction. *E.g., 9 Moore's Federal practice* ¶ 203.11, at 3-44 to -47 (1980).

One recognized exception to this rule is that a notice of appeal from a non-appealable order may be ignored by the lower court. *See id.* at 3-51 to -52. *But see id.* at 3-52 to -54. The order of October 29th obviously is interlocutory and non-appealable. (Motions to certify have been filed by several parties, including Commercial Union.) The Third Circuit generally follows this exception. *See, e.g.*, United States v. Leppo, 634 F.2d 101, 104-105 (3d Cir. 1980); Plant Economy, Inc. v. Mirror Insulation Co., 308 F.2d 275, 277 n.7 (3d Cir. 1962); *but see* District 65, Distributive Workers Union v. McKague, 216 F.2d 153, 155 (3d Cir. 1954) (once party appealled prematurely, appeal could not be certified by district court because it "was without jurisdiction to enter any order which would affect the status of the appeal.") Because nothing in this memorandum "would affect the status" of Commercial Union's premature appeal, there is no jurisdictional barrier to filing the memorandum. *McKague*, however, puts in doubt whether this court has jurisdiction to consider Commercial Union's motion for certification, or to conduct further proceedings on this claim.

(Because I have characterized the appeal as "obviously" premature, it is only fair to point out that I have no basis for believing it to be vexatious or in bad faith. Counsel often find appellate jurisdiction to be a mystery, resulting in a significant number of appeals from non-appealable orders. *See, e.g.*, Garth, *A View from Both Sides of the Bench*, 88 F.R.D. 93, 93-94 (1981).

Although the exposure versus manifestion issue has been decided in other cases,[19] no decision seems to have been reached at such an early stage of the proceedings. Part of the trouble is the large volume of filings relating to what the parties believe to be disputed or undisputed material facts.[20] Upon careful examination of the excess insurance policy and Pennsylvania law, I believe the material facts to be simple.

For the reasons which follow, I hold in favor of an exposure theory based on either of two simple, uncontroverted, and indisputable facts: 1) asbestos disease is cumulative; and 2) some microscopic damage occurs before manifestion of the injury. *See, e.g., Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 641 F. 2d 1212, 1214 (6th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 5023 (U.S. July 31, 1981) (No. 81-198). By the former, I mean that asbestos diseases are caused by an accumulation over time of asbestos particles in the body. Particles accumulated during exposure, but before manifestion of an asbestos disease, are a cause-in-fact of the disease. The second fact statement is self-explanatory.

For several reasons, these are facts as to which there is no genuine dispute within the meaning of Fed. R. Civ. Pro. 56. First, they are propounded by the insured and undisputed by any competent statement or offer of proof of the excess insurer. Alternatively, they are facts which I can, and do notice.

The parties' debate on notice centers around Fed. R. Evid. 201. I find that rule inapposite because the two key facts are

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[19] Keene Corp. v. Insurance Co. of N. Am., No. 81-1179 (D.C. Cir. Oct. 1, 1981); Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 5024 (U.S. July 31, 1981) (No. 81-200); Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *petition for cert. filed*, 50 U.S.L.W. 5023 (U.S. July 31, 1981) (No. 81-198); Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., Civ. Action 78-2739-Z (D. Mass. Aug. 14, 1981).

[20] In addition the parties have favored me with their briefs in other cases, their certiorari petitions and appendices, letters interpreting opinions in other cases, letters responding to letters interpreting opinions in other case, and letters to other judges interpreting other cases.

not "adjudicative."[21] Adjudicative facts are those "about the particular event which gave rise to the lawsuit and . . . [which] explain who did what, when, where, how, and with what motive and intent." *McCormick, supra* note 22, § 328, at 758. This claim requires me to construe an insurance policy. That construction depends on the objective manifestation of the parties' intent. Thus, the adjudicative facts are the policy language and the facts giving the background of the contract formation. The etiology of asbestos disease is not an adjudicative fact for this claim.

The policies in issue here require the excess carrier to indemnify the insured for liability "on account of personal injuries . . . arising out of any one occurrence." Umbrella Policy ¶ I, Affidavit of Robert E. Buckley, Exhibit O. "Personal injuries" include "bodily injury, . . . sickness, [and] disease." *Id.* ¶II(3). An "ocurrence" means one or more "happenings arising out of or resulting from one event taking place during the terms of this policy." *Id.* ¶II(4).[22] Thus, the excess insurer must indemnify for bodily injury, sickness, or disease arising out of a causative event within the policy period.[23]

Construing all ambiguities in the insured's favor, *see* part II.B.1 *supra,* asbestos exposure is an "occurence." Because the exposure is a cause-in-fact of the eventually manifested disease, the insurer must indemnify for the disease. In addition, I note that the term "bodily injury" must be construed against the insurer to include the pre-manifestation microscopic damage.

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[21] The rule limits judicial notice only of adjudicative facts. *See* Fed. R. Evid. 201(a). *See generally, e.g.,* E. Cleary, *McCormick's Handbook of the Law of Evidence* § 328 (1972) [hereinafter cited as *McCormick*]; 1 J. Weinstein & M. Berger, *Weinstein's Evidence* §§ 201 [01]-[03] (1980) [hereinafter cited as *Weinstein's Evidence*]. Alternatively, I hold these two facts to be noticeable as adjudicative facts under Fed. R. Evid. 201 (b) (1) or (2).

[22] The insurer cites language defining "occurrence" to include "continuous or repeated exposure to conditions which unexpectedly result in personal injury." This succinctly describes asbestos-disease etiology.

[23] Thus, in contrast to the policy in *Keene, supra* note 19, slip op. at 20, the policy here is unclear on whether the "occurrence" or the "injury" must occur during the policy period. This ambiguity also must be construed in the insured's favor.

The only reasonable period to which to attach this injury is the exposure period; one cannot attribute an injury to later-occuring manifestation. Thus, the excess carrier must indemnify for asbestos injury caused by exposure during the policy period.[24]

My holding accords with that of each circuit which has reached the issue. *See Keene Corp. v. Insurance Co. of North America,* No. 81-1179 (D.C. Cir. Oct. 11, 1981); *Porter v. American Optical Corp.,* 641 F. 2d 1128 (5th Cir. 1981), *petition for cert. filed,* 50 U.S.L.W. 5024 (U.S. July 31, 1981) (No. 81-200); *Insurance Co. of North America v. Forty-Eight Insulations, Inc.,* 633 F. 2d 1212 (6th Cir. 1980), *petition for cert. filed,* 50 U.S.L.W. 5024 (U.S. July 31, 1981) (No. 81-200); *Insurance Co. of North America v. Forty-Eight Insulations, Inc.,* 633 F. 2d 1212 (6th Cir. 1980), *petition for cert. filed,* 50 U.S.L.W. 5023 (U.S. July 31, 1981) (No. 81-200). *Contra, Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.,* Civ. Action 78-2739-Z (D. Mass. August 14, 1981) (Zobel, J.). The excess insurer seeks to avoid this result by turning this contract claim into a re-adjudication of the cause and development of asbestos disease. I have no doubt that the excess insurer has and can raise factual disputes.[25] None of those disputes, however, is material. The material facts are simple, uncontrovertable, and undisputed. As counsel for the insurer candidly admitted when asked if any medical evidence could exclude bodily injury prior to manifestation, the question whether there is "injury" within the meaning of the policy is a legal question, not a medical one. N.T. 78-79.

/s/ JAMES T. GILES

J.

[24] Yet another interpretation requiring indemnification is that the bodily invasion by asbestos fibers is itself an injury.

[25] For instance, the parties dispute whether microscopic damage occurs simultaneously with exposure.

APPENDIX B

Commercial Union Assurance Companies

To Southwestern Claims—Dock Hoffman

From Frank Conn—H. O. Claims Date 4/1/75

Subject ASBESTOSIS CASES Your Memo

The letter of March 7th, by Mr. Dale Dowell to Pete Hanlon in Houston was referred to me by Dean Dusthimer. I must agree that the point concerning date of injury is probably correct according to the Borel decision. I had re-read the decision some time ago and at that time, I noted that my earlier position concerning the date of accident being the date of manifestation or discovery was incorrect. The Borel decision does rather explicitly point out that the exposure to Asbestosis produces an injury each time there is exposure, therefore, I would think that an apportionment arrangement by the several carriers for a single defendant would make good sense.

The one thing that troubles me about the apportionment is that according to Texas law, the statute of limitations for an action brought on a written contract is four years. I would think, therefore, that once a defendant has notified his present carriers and subsequent carriers that might be involved, he is then limited in protection to those carriers who had coverage within four years prior to this notice. My thinking is that the manufacturer could not bring an action on the insurance contract against a carrier whose policy had expired prior to four years before the carrier was given notice of the loss. Perhaps our counsel can given us some advice on this point.

If this point is correct, it brings up a second problem. If the insurance coverage provides coverage only for the four years subsequent to notice, then does the insured bear the cost of settlement for the portion of the loss prior to four years or do the carriers for the last four years simply apportion the settlement for the defendant among themselves.

If the first assumption concerning the statute of limitations for contracts is incorrect and all prior carriers for a particular defendant are obliged to protect the insured, we still have the problem of interpretation of insurance policies prior to 1966. As you know in 1966, the general liability policy went from an "accident" basis to an "occurrence" basis. Therefore, we have the question of whether there would be coverage under an "accident" policy for this type of gradual injury according to Texas law at that time. I believe prior to this change, there was a change in 1955 and lord only knows what that policy said. Since the injury occurred under that policy, however, I think the coverage would be limited to that policy language.

I think that apportionment problem opens a Pandora's box of problems and a simple apportionment based upon years of coverage is much too simplistic a solution. I admit that my earlier idea that the date of manifestation or discovery was the date of loss was also incorrect. I do, however, feel we need more information on the points mentioned above, before we can assume that these losses should automatically be apportioned, or perhaps Mr. Mehaffy can give us some help with these questions.

FC/kmc

INTER-OFFICE CORRESPONDENCE

Amicus Brief

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Nos. 80-1012, 80-1030, 80-1052

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IN THE SUPREME COURT
OF THE
UNITED STATES
October Term, 1981

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,

Petitioner,

v.

NORMAN WILLIAMS COMPANY, et al.,

Respondents,

BOHEMIAN DISTRIBUTING COMPANY,

Petitioner,

v.

NORMAN WILLIAMS COMPANY, et al.,

Respondents,

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

Petitioner,

v.

NORMAN WILLIAMS COMPANY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

BRIEF AMICUS CURIAE OF CONSUMERS UNION OF UNITED STATES, INC. IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF CONSUMERS UNION OF UNITED STATES, INC. IN SUPPORT OF RESPONDENTS

Consumers Union of United States, Inc. ("Consumers Union") submits this brief as amicus curiae in support of Respondents[1]/ with the written consent of all parties, pursuant to Rule 36.2 of this Court.

INTEREST OF AMICUS CURIAE

Consumers Union is a nonprofit, membership organization chartered in 1936 to provide information, education and counsel about consumer goods and services and the management of family income. Consumers Union publishes Consumer Reports, a monthly magazine with a circulation of over 2.9 million, which regularly carries articles rating products that Consumers Union has tested,

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1/ Unless otherwise indicated, references in this brief to "Respondents" are to non-franchised wholesalers, although some liquor retailers are Respondents in this case.

as well as articles on consumer services, marketplace economics and judicial actions that affect consumer welfare. Approximately 300,000 residents of California subscribe to Consumer Reports.

Consumers Union in no way supports increased alcohol consumption, but has long opposed laws which restrict competition in consumer goods. Since early 1977, the West Coast Regional Office of Consumers Union has been an active participant in California in both litigation and legislative debate concerning the pricing and distribution of alcoholic beverages. Attorneys representing Consumers Union sought and were granted leave to appear as amicus curiae in Rice v. Alcoholic Beverage Control Appeals Board, 21 Cal.3d 431, 579 P.2d 476, 146 Cal.Rptr. 585 (1978) and California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

Consumers Union strongly opposed amending Business and Professions Code § 23672 (the "designation statute"), which is at issue here, when the California Legislature considered the amendment in 1979. We argued then and maintain now that the designation statute is unsound as a matter of public policy and will not encourage temperance or further any other state interest. We agree with Respondents that the measure is also inconsistent with and preempted by the federal antitrust laws, violative of the due process and equal protection clauses of both the United States and California Constitutions, and is an unlawful delegation of legislative power. In addition, the designation statute will impose a substantial cost on California consumers in the form of higher prices for distilled spirits.

STATEMENT

The court below found the designation statute invalid because it conflicts with and is preempted by the Sherman Act. The portion of the statute which the court found invalid provides:

> A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent. Business and Professions Code § 23672 (West's Supp., 1981).

SUMMARY OF ARGUMENT

The designation statute would eliminate competition at the wholesale level by prohibiting Respondents from importing nationally advertised brands of distilled spirits, which account for 90% of the distilled spirits consumed in California. Eliminating this competition

will cause a substantial increase in the amount of money California consumers spend on distilled spirits, but will have no dampening effect on consumption.

The anti-competitive effects of the designation statute clearly conflict with the federal antitrust laws. Since, as the court below found, the designation statute serves no state interest, it cannot be immune from federal antitrust laws under the "state action" doctrine of Parker v. Brown, 317 U.S. 341 (1943), and its progeny. When California's interest in the designation statute (which was enacted under the grant of power contained in the Twenty-First Amendment), is weighed against the federal interest in the Sherman Act (which is coextensive with Congress' broad power to regulate commerce), the balance tips in

favor of the federal antitrust laws, thus preempting the designation statute.

The designation statute is also invalid on a number of state grounds which the court below did not explicitly rely on.

ARGUMENT

Petitioner Wine & Spirits Wholesalers of California ("WSWC") has described the situation resulting from the decision of the court below as follows:

> 1) the number of potential sources of supply for a particular brand has increased due to the addition of Oklahoma wholesalers and potential suppliers from other states,
>
> 2) any and all California importers may acquire any brand of distilled spirits, and
>
> 3) the location and identity of the importers of a particular brand are subject to monetary (sic) change. Brief of Petitioner WSWC at 36.

Consumers Union finds this a particularly apt description of a competitive market which has led to substantial benefits for consumers. Competition within the distilled spirits market in California at the wholesale level is at stake in this case. Because the designation statute has been held invalid, Respondents are able to import distilled spirits and sell them to retailers for less than the brand owners' suggested prices, which the franchised wholesalers adhere to. Norman Williams v. Rice, 108 Cal.App.3d 348, 353; 166 Cal.Rptr. 563, 567 (1980). The designation statute would prohibit Respondents from importing distilled spirits, thus eliminating the only meaningful form of competition at the wholesale level. Eliminating wholesale competition will certaintly cause retail prices to rise, but will have no effect on the

amount of alcohol consumed, as both this Court and the California Supreme Court have recognized. Midcal, 445 U.S. at 113; Rice v. Alcoholic Beverage Control Appeals Board, 21 Cal.3d 431, 146 Cal.Rptr. 585, 603 (1978).

The savings for consumers at stake in this case are staggering. In 1978, Californians consumed 20,936,126 cases of distilled spirits. J.A. 32. According to the prices posted with the California Department of Alocholic Beverage Control by Berberian Bros., Inc., a designated wholesaler, and Norman Williams Co., one of the Respondents, the designated wholesaler was charging retailers nearly $16.00 more per case for Johnnie Walker Red Label Scotch Whiskey and nearly $20.00 more per case for Johnnie Walker Black

Label Whiskey, in October, 1979.2/ These figures indicate potential savings to California consumers of approximately $1.25 to $1.50 per bottle. Some reports have placed the per bottle savings to

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2/ On its November 15, 1979 Distilled Spirits Price Posting Schedule, Berberian Bros., Inc. ("Berberian") lists its price to retailers for a case of one-quart bottles of Johnnie Walker Red Label Scotch Whiskey ("Johnnie Walker Red") as $112.72. Berberian's price to retailers for a case of one-quart bottles of Johnnie Walker Black Label Scotch Whiskey, 12 year ("Johnnie Walker Black") was $152.88. Exhibit C to Petitioners Replication and Memorandum in Support Thereof, dated February 5, 1980. Respondent Norman Williams Co.'s Price Posting Schedule of the same date, shows its price to retailers for a case of one-quart bottles of Johnnie Walker Red was $96.93, which is $15.79 less than Berberian's price at the time. Norman Williams Co.'s price to retailers for a case of one-quart bottles of Johnnie Walker Black was $133.25, which is $19.63 less than Berberian's price at that time. Exhibit G to Amended Petition for Writ of Mandate and/or in the Alternative, Prohibition and/or Certiorari, dated November 15, 1979.

consumers from the activities of Respondents as high as $2.50 per bottle[3]/ However, even assuming the savings is only $0.25 per bottle, price competition could save California consumers $62,808,378 each year.[4]/ These savings are what the California courts, legislature and consumers had in mind when fair trade was eliminated. The designation statute is an attempt to revive fair trade, with its security for franchised wholesalers, lack of competition, and high prices for the liquor industry. The court below rejected this attempt to bring fair trade in through the back door as incon-

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3/ "Jack Daniels, meet Adam Smith," FORBES, November 23, 1981, p. 164.

4/ Savings computed using a figure of 12 bottles per case, which is how quarts, liters, fifths and 750 ml. bottles are packaged.

sistent with and preempted by the Sherman Act. This Court should affirm the decision below.

I.

THE DESIGNATION STATUTE IS ANTI-COMPETITIVE IN EFFECT AND IS PREEMPTED BY THE SHERMAN ACT

A. The Designation Statute Attempts To Authorize Practices Which Violate The Sherman Act

Consumers Union does not question California's power to regulate liquor importers; California has a licensing procedure which fills this function and all of Respondents are licensed. (Joint Appendix ("J.A.") 15). The designation statute goes beyond licensing, however, by allowing the distillers to make the final decision on who will be allowed to import distilled spirits into California and who will not. This allows the brand owners to eliminate competition at the wholesale

level in violation of section 1 of the Sherman Act. As the court below found, the designation statute "gives private parties the unfettered power to forbid interstate trade between other privates(sic) parties. Such a grant of authority is in direct contravention of the express terms of the Commerce Clause and the Sherman Act." Norman Williams, 108 Cal. App.3d at 358, 166 Cal. Rptr. at 570.

The Sherman Act prohibits anti-competitive practices by private parties such as group boycotts or price fixing. Fashion Originators Guild of America, Inc. v. F.T.C., 321 U.S. 457 (1941), United States v. Parke, Davis and Co., 362 U.S. 29 (1960). The Sherman Act seeks to eliminate these kinds of abuses in free markets by making such practices violations of federal law. In some instances states

have sought to authorize private parties to engage in such practices, but this Court has struck down those attempts as inconsistent with the Sherman Act. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). In this case there is an even clearer affront to Sherman Act principles because the designation statute does not simply authorize violations of the Sherman Act by brand owners. The designation statute actually creates the singular circumstances under which the violation can take place. Without the designation statute, a brand owner might lawfully prevent wholesalers with whom he does business from selling to other wholesalers, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), but he could never prevent a wholesaler from purchasing the brand

owner's distilled spirits.[5]/ The designation statute explicitly prohibits undesignated importers--although fully licensed by the state--from purchasing distilled spirits and importing them into California. This is a restraint on competition which no brand owner could accomplish through vertical restraints. In fact, short of physical restraint or intimidation, it is difficult to conceive of a way in which the distillers could prevent Respondents from importing distilled spirits which they have lawfully purchased. That the designation statute gives the distillers this power only underscores the tremendous privilege conferred

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[5]/ In Oklahoma, the brand owner cannot even restrict the wholesalers he sells to. The brand owner must sell to all wholesalers who wish to buy his brand, Okla. Stat. Tit. 37, § 533 and the wholesalers are free to sell to all "qualified persons." Okla. Stat. Tit. 37, § 521(e).

upon the distillers by the designation statute.

B. The Violation Of The Sherman Act Which The Designation Statute Authorizes Is A Per Se Violation

The court below noted that the violation of the Sherman Act which the designation statute authorizes is difficult to analyze in terms of the usual "per se" and "rule of reason" categories, but concluded that "A more clear power to restrain interstate trade is difficult to imagine." Norman Williams, 108 Cal.App.3d at 356, 166 Cal.Rptr. at 569. Per se violations of the Sherman Act are those occasioned by "practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate

inquiry as to the precise harm they have caused or the business excuse for their use." Sylvania, 433 U.S. at 50, quoting Northern Pac. R. Co. v. United States, 366 U.S. 1, 5 (1958). In deciding whether a particular practice is a per se violation of the Sherman Act, "The probability that anti-competitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences." Sylvania, 433 U.S. at 50, fn.16.

1. The Anti-Competitive Consequences of the Designation Statute Are Certain and Severe

Here, the anti-competitive consequences are not merely probable, they are certain. Respondents have been denied designation by the brand owners, Norman Williams, 108 Cal.App.3d at 354, 166 Cal.Rptr. at 568, and

will therefore be excluded from the import market. The severity of the anti-competitive consequences is clear. 90% of the distilled spirits consumed in California are imported (J.A. 14), so the designation statute would eliminate the only meaningful competition at the wholesale level for virtually all distilled spirits.

2. The Designation Statute Has No Pro-Competitive Consequences

Before determining that the designation statute occasions a per se violation of the Sherman Act, the anti-competitive consequences must be balanced against the pro-competitive consequences. Sylvania, 433 U.S. at 50, fn.16. That is an easy task, because the designation statute will have no pro-competitive consequences. Although various petitioners and amici

have argued that the designation statute would allow franchised wholesalers to better serve their retailers, these arguments reflect nothing more than a desire to recover and retain the privileged position they held under fair trade laws, free from the pressures of competition. Wine and Spirits Wholesalers of America, Inc. and National Beer Wholesalers Association of America, Inc., ("WSWA and NBWA") in their amici curiae brief argue that the designation statute will protect authorized wholesalers from harm by other wholesalers who sell only to high volume retailers, thus "cream skinning" the most profitable accounts off the market. Brief of Amici Curiae WSWA and NBWA at 7-8.

But this type of activity can take place in any industry and is an accepted

part of competitive life. Petitioners are seeking to use the designation statute to shield them from the realities of competition. If it were true that the designation statute "merely recognizes" the distillers' "inherent power to designate importers to whom they will sell," as petitioners claim, Norman Williams, 108 Cal.App.3d at 357, 166 Cal.Rptr at 569, it would serve no purpose. What the designation statute actually does is grant the distillers a power they cannot exercise under the Sherman Act.

3. The Designation Statute Has the Effect of a Group Boycott

By giving the distillers the power to prevent Respondents from purchasing distilled spirits, California is sanctioning and enforcing an action which has the same effect as if all the distillers had

agreed with all of their franchised wholesalers not to sell to Respondents. This group boycott would deny Respondents access to 90% of the California distilled spirits market and would be a per se violation of the Sherman Act. Fashion Originators Guild of America, Inc. v. F.T.C., 312 U.S. 457 (1941). The distillers could avoid this result only by designating all licensed wholesalers. The designation statute obviously does not contemplate this possibility, since the statute would have no meaning if all licensed wholesalers were designated by the distillers.

The designation statute therefore authorizes a per se violation of the Sherman Act, as described by this court in Sylvania, Northern Pac. R. Co. v. United States, and Fashion Originators Guild.

C. Distillers And Franchised Wholesalers Are Adequately Protected By Other California Statutory Provisions

Even without the designation statute, Petitioners will be insulated from certain forms of competition. For example, "loss leaders" and premiums or gifts are already prohibited under California law.6/ If Respondents were to compete unfairly, Petitioners could seek redress under existing state law. Unfair Practices Act,

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6/ Business and Professions Code § 17044 prohibits using a "loss leader," defined in Business and Professions Code § 17030 as "any article or product sold at less than cost" where the intent is to encourage sales of other merchandise, mislead purchasers or injure competitors. "Cost" is defined in Business and Professions Code § 17026 as "invoice or replacement cost, whichever is lower ... plus the cost of doing business ... and in the absence of proof of cost of doing business a markup of 6 percent on such invoice or replacement cost." Gifts and sales under cost, with the intent of injuring competitors or destroying competition are prohibited by Business and Professions Code § 17043.

Business and Professions Code §§ 17000 et seq. Petitioners have shown nothing so unique, fragile, or even necessary about the liquor industry that requires it to be further insulated from competition by prohibiting would-be competitors from entering the market. Unlike the effect of Oklahoma's "open wholesaling" statute,[7] the lack of a designation statute will not force the brand owners to sell to wholesalers with whom they do not want to do business. Invalidating the statute will simply allow Respondents to continue to buy distilled spirits out of state, and sell them in California at prices below those charged by the authorized wholesalers, who adhere to the brand owners' "suggested" prices. J.A. 14 .

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[7] Okla. Stat. Tit. 37, § 533.

D. The Sherman Act Should Be Used To Preserve The Competition Which Respondents Have Brought To The Market

It is remarkable that Petitioner Bohemian Distributing Company should attack the decision below on the ground that "federal antitrust law protects the process of competition, not the welfare of particular competitors," (Brief of Petitioner Bohemian Distributing Company, at 10) for protection of franchised wholesalers such as Bohemian is precisely what the designation statute seeks to accomplish. The designation statute was enacted to prevent competition by cutting off Respondents' source of supply for name brand liquor, thus forcing them out of business. If this Court reverses the decision below, it is the welfare of the large franchised wholesalers that will be protected, not the "process of competition."

Contrary to Petitioner Bohemian's contention, the federal antitrust laws seek to preserve the competition which Respondents have brought into the wholesale market, not to protect franchised wholesalers in their insulated positions.

II.

THE DESIGNATION STATUTE DOES NOT FURTHER ANY STATE INTEREST OF CALIFORNIA

A. The California Court's Findings Should Be Accorded Great Weight

The court below found no state interest is served by the designation statute. Norman Williams, 108 Cal.App.3d at 361, 166 Cal.Rptr. at 572. When the same court found no state interest was furthered by the price fixing statute in Midcal, this Court gave "great weight" to its views. Midcal, 445 U.S. at 111. The same result should obtain in this case.

It is interesting to note in this regard that Petitioner Rice, Director of the California Department of Alcoholic Beverage Control, does not appear from the legislative history to have even supported the legislation amending the designation statute. J.A. 56-73. Rice's comments in a recent magazine interview throw further doubt on the possibility that California believes the designation statute furthers any state interest. "Jack Daniels, Meet Adam Smith," FORBES, November 23, 1981.8/

8/ "What's shaping up in the liquor business today is a classic case of survival of the fittest--similar to developments in the airline, trucking and savings and loan industries. "Those that can adapt, will, those that can't, perish' says Rice ... 'that's the way the free enterprise system is supposed to work.'" "Jack Daniels Meet Adam Smith," FORBES, Nov. 23, 1981, p. 163.

B. The Designation Statute Will Not Aid California In Taxing Or Tracing Distilled Spirits

Petitioner WSWC claims the designation statute will aid California in taxing and tracing distilled spirits. The court below was corrected in rejecting this claim, Norman Williams, 108 Cal.App.3d at 361, 166 Cal.Rptr. at 572. There is nothing in the designation statute's legislative history to suggest that the California Legislature even considered administrative interests. J.A. 57-73. The only substantive justification Petitioners have averred for their administrative claim is that without the designation statute, the number of competitiors will increase and overseeing liquor will become "administratively more burdensome" for California. Brief of Amici Curiae, WSWA and NBWA at 31.

Absent some showing that California would "lose control" over distilled spirits wholesaling due to the increased administrative burden, administrative ease cannot be a legitimate state interest. In fact, California has been operating with an increased number of competitors for over 3 years, and there is no evidence that California's control over and review of liquor importation and taxation has been threatened in any way. Petitioners have not cited, nor do we know of, any enforcement actions made necessary by the increased number of competitors. Under Business and Professions Code § 23366.3, the Oklahoma wholesalers cannot ship distilled spirits into California until they agree to make their records available to California officials. The designation statute will not help California

officials in attempting to trace or tax distilled spirits shipments.

C. The Designation Statute Will Not Aid In Temperance

Petitioners have also advanced temperance as a justification for the designation statute, Norman Williams, 108 Cal.App.3d at 360, 166 Cal.Rptr. at 572. But they have completely failed to explain how the designation statute would further this goal. All the designation statute does is eliminate competition at the wholesale level. This will raise prices, but as the California Supreme Court found in Rice, higher liquor prices do not decrease consumption, Rice, 21 Cal.3d at 457, 146 Cal.Rptr. at 603. In Midcal, this court agreed. Midcal, 445 U.S. at 112-13.

D. The Designation Statute Will Not Protect Small Retailers

A final state interest which has been asserted is that of protecting small retailers. As noted above, the only certain effect of the designation statute is that it will raise prices by eliminating competition at the wholesale level. But as the California Supreme Court found in Rice, higher liquor prices do not protect small retailers. Rice, 21 Cal.3d at 456-7, 146 Cal.Rptr. at 602. See also Midcal, 445 U.S. at 113.9/ Small retailers are not hurt by the competition at the wholesale level, as can be seen from the fact that Respondent

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9/ Studies cited in Rice showed that retailers failed in fair trade states more frequently than in states without "fair trade" laws, even though the states without "fair trade" laws had lower prices. Rice, 21 Cal.3d. at 456, fn.21, 146 Cal.Rptr. at 602, fn.21.

wholesalers sell to small retailers (J.A. 15), and some of the Respondents in this case are small retailers who favor retaining the current competitive wholesale market in California. (J.A. 15).

III.

THE DESIGNATION STATUTE DOES NOT COME WITHIN THE STATE ACTION DOCTRINE

As this Court recognized in Midcal, the "state action" doctrine is designed to preserve our federal system by not allowing the Sherman Act to override state regulatory programs. Midcal, 445 U.S. at 103-4. In order for the "state action" exemption to apply, however, the anti-competitive practice at issue must be "clearly articulated and affirmatively expressed as state policy" and "'actively supervised' by the State itself." Midcal, 445 U.S. at 105

A. The Designation Statute Is Not Clearly Expressed As State Policy

In this case neither requirement of Midcal is fulfilled. The designation statute does not embody any clear state policy, because no state interest is furthered by the designation statute.10/ In fact, as the court below noted, the designation statute is directly opposed to the policy of competition expressed in the rest of California's laws governing distilled spirits. Norman Williams, 108 Cal.App.3d at 360 fn.3, 166 Cal.Rptr. at 572 fn.3.

10/ Supra at 24-30.

1. California's Distribution System Seeks to Encourage Competition; the Designation Statute Seeks to Prevent Competition

California's distribution system for distilled spirits has been characterized by Petitioners as "three-tiered." That is, there are distillers, wholesalers and retailers, with each level operated independently of the others. This description is not completely accurate, however. California also has rectifiers, businesses which purchase distilled spirits outside of California, bring the alcohol into California, add water to bring the liquid to the desired proof and then sell the final product to California wholesalers.11/ These products are some of the so-called "house

11/ Distilled spirits rectifiers are licensed under Business and Professions Code § 23368.1. A distilled spirits rectifier may also hold a distilled spirits wholesaler's license. Business and Professions Code § 23368.1 (West's Supp., 1981).

brands" which account for 10% of the distilled spirits consumed in California. (J.A. 17).

The point of California's three-tier system is not, as Petitioners would have this Court believe, that it is somehow magically related to the state's interest in liquor control. Rather, the three-tier system is a way to preserve competition by ensuring that the chain of distribution for distilled spirits does not become integrated and controlled by the brand owners. The pro-competitive policy behind preventing integration is evident. This is the opposite of the policy behind the designation statute, which seeks to eliminate competition at the wholesale level. Currently, twelve franchised wholesalers handle approximately 70% of the wholesale volume in imported distilled

spirits in California. J.A. 14. If this Court affirms the decision below, Respondents and others like them will be able to remain vigorous competitors with the franchised wholesalers, thus making the wholesale market competitive.

2. The Designation Statute Does Not Protect California's Distribution System Because That System Is Not Threatened by Respondents' Activities

Even if the three-tier system is considered an end in itself, the designation statute does not clearly express state policy because the three-tier sytem is not threatened by the "Oklahoma connection." All out of state shippers of distilled spirits (including the Oklahoma wholesalers who ship to Respondents) must obtain an "out-of-state distilled spirits shipper's certificate" from the Department of Alcoholic Beverage Control before the

distilled spirits can be shipped into California. Business & Professions Code § 23366.2 (West's Supp., 1981). In order to receive the certificate, the shipper must agree to comply with all California laws and regulations regarding distilled spirits and to make its books and records available to California officials for inspection. Business & Professions Code § 23366.3(a)(1) & (2). The shipper's certificate can also be revoked or suspended in the same manner as liquor licenses. Business and Professions Code § 23366.3(b). Thus, California law has already effectively absorbed the Oklahoma wholesalers into the three-tier system.

B. California Does Not Take An Active Role Under The Designation Statute

Not only is the designation statute not expressed as state policy, California also takes no part in making the decisions mandated by the statute. The brand owners make the only decisions under the designation statute, with no guidance or review by the state. In fact, what this Court said about the price setting program in Midcal is perfectly applicable here:

> The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. Midcal, 445 U.S. at 105-6.

Here the state neither decides which wholesalers are to be authorized, nor reviews the reasonableness of the brand owner's decisions; nor does it regulate

the terms of the designation contracts. The state does not monitor market conditions or engage in any "pointed reexamination" of the program. The designation statute therefore does not provide for any "active supervision" by the state, as required by this Court in Midcal.[12]/ Active supervision by the state is necessary before the program can be found immune from federal antitrust laws.

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[12]/ Even the instructions put out by the California Department of Alcoholic Beverage Control for use by out of state distilled spirits shippers do not indicate that California will take an active part in supervising the designation of authorized wholesalers. WSWC Petition for Certiorari, Appendix F, at 26.

IV.

THE TWENTY-FIRST AMENDMENT DOES NOT CONFER UNLIMITED POWER UPON THE STATES TO ENACT LEGISLATION WHICH CONFLICTS WITH THE SHERMAN ACT

A. The Twenty-First Amendment Did Not "Repeal" The Commerce Clause; The Two Must Be Balanced

Section 2 of the Twenty-First Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

As this Court recognized in Midcal, these broad state powers can conflict with Congress' power to regulate interstate commerce. How the conflict is resolved turns upon the circumstances of each particular case. Midcal, 445 U.S. at 110.

Petitioners would have this Court resolve the conflict by simply having the Twenty-First Amendment overrule the Commerce

Commerce Clause in the area of liquor regulation. This Court has refused to take such a simplistic course in the past. In Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964), this Court reviewed prior decisions allowing the states great leeway in liquor regulation and stated:

> To draw a conclusion from this line of decisions that the Twenty-First Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. Idlewild, 377 U.S. at 331-2.

Instead, this Court concluded the Twenty-First Amendment and the Commerce Clause "each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." Idlewild, 377 U.S. at 332. In Idlewild, the only state interest

the Court could find was in preventing diversion of alcohol from Idlewild's duty free international business to domestic commerce. Idlewild, 377 U.S. at 333. But New York was admittedly not seeking to do this so the Court held New York's law prohibiting Idlewild's type of business invalid under the Commerce Clause. Idlewild, 377 U.S. at 334.

B. The State's Interest Must Be Weighed As A Matter Of Federal Law

Although more complex than the analysis urged by Petitioners, finding and weighing the state's interests allows the court to strike the correct balance between the Twenty-First Amendment and the Commerce Clause for each case. In Midcal, this court explicitly recognized that the balance struck can differ

depending on the state interests involved. The court stated:

> The Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. Midcal, 445 U.S. at 110.

This passage establishes a clear dichotomy, one which the court below followed explicitly. Norman Williams, 108 Cal.App.3d at 359, 166 Cal.Rptr. at 571. A state has a clear and important interest in deciding whether to permit the importation or sale of liquor. The state has a similarly clear interest in deciding how to structure the liquor distribution system. In these areas, then, the states have a great amount of control, free from the Commerce

Clause. It is the states' interests that give them this freedom, however, not the fact that a statute can be characterized as concerning "importation" or "distribution." A state does not have the same freedom when enacting statutes which involve less important state interests.

The Twenty-First Amendment is essentially a grant of power to the states of an authority they had given up under the Commerce Clause. In balancing the two provisions, we should not "lose sight of the explicit grant of authority." Midcal, 445 U.S. at 107. The need to balance the Twenty-First Amendment and the Commerce Clause is well understood by the California courts. In Rice, the California Supreme Court recognized:

> When a statute enacted pursuant to the Twenty-First Amendment conflicts with an enactment based on the commerce clause,

> we must balance the policies furthered by each in order to determine which should prevail. Rice, 21 Cal.3d. at 443, 146 Cal. Rptr. at 596.

The California Appellate Court which considered Midcal followed Rice exactly on this point. That court is the same California Appellate court which invalidated the designation statute in this case. When this Court reviewed Midcal, it approved the balancing done in that case and, by implication, Rice. Midcal, 445 U.S. at 111-13. The same balancing was done by the court below in this case and should be affirmed.

C. State And Federal Interests Must Be Balanced As A Matter Of State Law

Balancing the state and federal interests is mandated not only by this Court's decision in Midcal, but also by the California Constitution. Article XX,

§ 22 of the California Constitution grants the State of California "subject to the laws of the United States regulating commerce between foreign nations and among the states....the exclusive right and power to regulate the importation into and exportation from the State, of intoxicating liquor." Cal. Const. Art. XX, § 22 (West's Supp. 1981). The California Constitution explicitly recognizes the supremacy of federal regulation even in areas covered by the Twenty-First Amendment. Therefore, as a matter of state law, the state and federal interests must be balanced, as the court below did.

As the court below found, no legitimate state interest is furthered by the designation statute. This conclusion was arrived at by the same California

Appellate Court whose decision was approved in Midcal and is entitled to great weight. Midcal, 445 U.S. at 111-12. The designation statute has the same effect as a group boycott, a per se violation of the Sherman Act. Indeed, the anti-competitive effects of the designation statute are even greater than those of a group boycott. Under these circumstances, as in Midcal, the federal interests clearly predominate, and the designation statute is therefore preempted by the Sherman Act.

V.

THE DESIGNATION STATUTE IS INVALID ON STATE GROUNDS

In the court below, Respondents raised a number of state grounds on which the designation statute could be found invalid. The court below found the designation statute invalid because it

conflicts with and is preempted by the Sherman Act and declined to consider Respondents' contentions based on state grounds. Norman Williams, 108 Cal.App.3d at 362, 166 Cal.Rptr. at 573.

One of these state grounds is that the designation statute is an unlawful delegation of state power. Article XX, Section 22 of the California Constitution provides the State of California has the "exclusive right" to regulate intoxicating liquor, subject only to the laws of the United States. California Constitution, Art. XX, Sec. 22 (West's Supp., 1981). The designation statute delegates to the distillers the final authority over who shall be allowed to import distilled spirits, in violation of Art. XX, Sec. 22 of the California Constitution.

Other state grounds which respondents raised, but which were not dealt with by the court below include violations of the California Constitution's guarantees of due process and equal protection (California Constitution, Art. I, Sec. 7). If this Court should conclude that the designation statute is not preempted by federal legislation, the proper course would be to remand the case for consideration of the state grounds.

CONCLUSION

The court below found the designation statute invalid because it conflicts with and is preempted by the Sherman Act. That decision is correct and should be affirmed by this Court.

Dated: February 16, 1982.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INSURANCE COMPANY OF NORTH AMERICA,
v. *Petitioner*
KEENE CORPORATION,
——— *Respondent*

HARTFORD ACCIDENT & INDEMNITY COMPANY,
v. *Petitioner*
KEENE CORPORATION,
——— *Respondent*

AETNA CASUALTY AND SURETY COMPANY,
v. *Petitioner*
KEENE CORPORATION,
——— *Respondent*

LIBERTY MUTUAL INSURANCE COMPANY,
v. *Petitioner*
KEENE CORPORATION,
——— *Respondent.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE HOME INSURANCE COMPANY IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE HOME INSURANCE COMPANY

Pursuant to Rule 36.1 of this Court's Rules, The Home Insurance Company ("Home"), having been unable to obtain the consent of all the parties, moves for leave to file the attached brief *amicus curiae* in support of the petitioners [1] for the following reasons:

1. This proceeding concerns the proper interpretation of liability insurance policies as they relate to claims of asbestos-caused injuries.

2. Amicus Home has, at varying times, issued primary and excess liability insurance policies to various asbestos manufacturers, including the Keene Corporation ("Keene"), the insured in this matter. Home is a proponent of the "injurious exposure" theory of insurance coverage adopted by the Sixth Circuit in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (Dec. 7, 1981) and the Fifth Circuit in *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (Dec. 7, 1981).

3. In this case, however, the District of Columbia Circuit adopted a substantially different theory of coverage—the "triple trigger" theory—which Home believes is at variance with the relevant policy terms and pertinent state law.

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[1] The Insurance Company of North American filed its petition with the Court on November 30, 1981 (No. 81-1012), and Hartford Accident & Indemnity Company filed its petition on December 24, 1981 (No. 81-1197). Home is advised that Liberty Mutual Insurance Company and Aetna Casualty and Surety Company will each shortly be filing petitions with this Court. The present brief is filed in support of all four petitions.

4. Because Home has issued excess insurance policies to Keene and because, like many national insurers, Home is caught up in the confusion and uncertainty engendered by the conflict between Circuit Court opinions created by the present decision, amicus Home has a substantial interest in this case. For these reasons and because its brief presents an important perspective on the issues before this Court, this motion for leave to file a brief as *amicus curiae* should be granted.

Respectfully submitted,

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE HOME INSURANCE COMPANY IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

Amicus The Home Insurance Company ("Home") urges that this Court grant the pending petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in *Keene Corp. v. Insurance Company of North America, et. al.*, (Nos. 81-1179-1182), slip op. (D.C. Cir., October 1, 1981).[1] Unlike recent decisions of the Fifth and Sixth Circuits, which this Court appropriately declined to review,[2] the District of Columbia Circuit's *Keene* decision refused to apply basic principles of insurance law that are uniform from state to state, in violation of the doctrine of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) and the Rules of Decision Act, 28 U.S.C. § 1652 (1976), thereby creating a conflict among the Circuit Courts of Appeal regarding the meaning of virtually identical insurance policy provisions as they pertain to claims of asbestos-caused injuries.

This aberrant decision, if allowed to stand, will have immediate and powerful impacts far beyond the present proceeding. The wave of asbestos litigation now engulfing state and federal courts—between 12,000 to 20,000 cases, growing at the rate of 300 new cases per month[3]—is probably the largest collection of product liability actions ever to arise in this country, involving billions of dollars of potential liability.[4] In addition, the hotly contested issues of insurance coverage that are central to the na-

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[1] The opinion is reprinted at p. 1a of the Appendix to the Petition for a Writ of Certiorari filed by Insurance Company of North America. Citations to the *Keene* opinion ("Op.") in this brief will refer to the appropriate pages of that Appendix.

[2] *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (Dec. 7, 1981); *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (Dec. 7, 1981).

[3] *National Law Journal*, October 19, 1981 at 1, 24.

[4] *Business Week*, November 9, 1981 at 39-40.

tionwide asbestos litigation will almost certainly recur in numerous future lawsuits seeking indemnity for harms allegedly caused by a host of environmental contaminants whose potentially pernicious health effects are only now beginning to be understood.

In view of the wide-ranging repercussions of the *Keene* decision and the confusion and uncertainty it has produced, it is critical that this Court grant the writ.

INTEREST OF THE *AMICUS CURIAE*

Amicus Home has for a number of years provided liability policies insuring various asbestos manufacturers against liability for bodily injury. In 1969-1971, Home provided excess liability coverage to respondent Keene Corporation ("Keene").[5] Now, in the wake of the onrush of litigation seeking damages for claimed asbestos-related injuries, the interpretation of its policies is of substantial concern to Home.[6]

The recent decision of the District of Columbia Circuit in *Keene* has direct and dramatic consequences upon Home's stake in the nationwide asbestos litigation. The *Keene* panel reversed the trial court, which had followed the cogent rulings of the Sixth and Fifth Circuits that all insurers "on the risk" during the time of injurious exposure to asbestos fibers should share liability on a pro rata basis. Enforcing a new and different theory, the D.C. Circuit broadly held that an insurer's liability may be triggered by initial exposure to asbestos, by continued exposure "in residence" in the lungs, or by the discovery or manifestation of injury or disease, and that each insurer whose coverage is "triggered" is liable

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[5] Under these policies, and subject to all their terms and conditions, Home provided excess bodily injury insurance protection in the amount of $10 million; primary insurance protection in the amount of $500,000 was provided by Aetna Casualty and Surety Company.

[6] Home is currently a party to various asbestos lawsuits seeking declaration of its insurance obligations as a provider of excess coverage to manufacturers of asbestos products.

to Keene for 100% of the costs of indemnification and defense, regardless of how long or short the policy period. The opinion further held, over a well-reasoned dissent, that an asbestos manufacturer is not liable for any costs of indemnification or defense, not even for a *pro rata* share of those costs attributable to periods during which an asbestos manufacturer consciously chose to purchase either no insurance or inadequate insurance. This unprecedented approach, if it is allowed to stand, could subject liability carriers such as Home to massive judgments. Home therefore has a vital interest in seeking correction of the serious errors of law committed by the *Keene* panel.

CONSENT OF THE PARTIES

Although Keene has refused to consent to the filing of this amicus brief, Insurance Company of North America, Hartford Accident & Indemnity Company, Liberty Mutual Insurance Company, and Aetna Casualty and Surety Company do not oppose Home's submission of this brief.

SUMMARY OF ARGUMENT

In interpreting commercial contracts of insurance by reference not to the terms of the policies, but instead to the putative "reasonable expectations" of the manufacturer which purchased the insurance, the District of Columbia Circuit Court panel defied applicable state law, violated the doctrine of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), and ignored record evidence.

Judge Bazelon's *Keene* opinion also disregarded controlling state law and the *Erie* doctrine in refusing to allocate liability for asbestos-caused injuries among all properly accountable parties, *viz.*, both the insurers and the manufacturer, which for certain periods of time purchased either no insurance coverage or inadequate insurance coverage.

For these reasons, and because the *Keene* decision has created a direct conflict of authority within the federal courts of appeal that adversely affects the administra-

tion of justice in thousands of asbestos-related cases, a corrective decision by this Court is necessary and appropriate.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT BECAUSE THE *KEENE* PANEL'S USE OF A "REASONABLE EXPECTATIONS" METHODOLOGY TO INTERPRET COMMERCIAL CONTRACTS OF INSURANCE VIOLATES CLEARLY ESTABLISHED STATE LAW THAT IS CONTROLLING UNDER THE *ERIE* DOCTRINE.

From its initial premise to its final conclusion, the District of Columbia Circuit's opinion subverts the *Erie* doctrine. The court based its opinion, not on reasoned analysis of policy language in light of established state law principles, but rather on the presumed "reasonable expectations" of the insured, Keene:

> [T]he principles embodied in the insurance policies provide a sufficient basis upon which to decide this case. In discerning those principles, our guide is—as it must be—the reasonable expectations of Keene when it purchased the policies. Op. at 12a.

Upon this initial assumption, the panel proceeded to surmise that, in purchasing various contracts of insurance at various times, Keene reasonably expected to be free from *all* liability for *any* asbestos-related injuries at *any* time. Op. at 21a-23a. Then, in order to give effect to what it, in hindsight, generously perceived to be the scope of Keene's "reasonable expectations", the court enunciated an expansive, unprecedented rule of insurer liability: under the *Keene* decision, each insurer is fully liable for an asbestos-caused injury so long as either the initial exposure to asbestos takes place during the insurer's policy period, continued injurious exposure "in residence" in the lungs occurs during the term of the policy, or asbestos-caused disease or death clinically manifests itself during the policy period. *Id.*

The result reached by the court was at substantial variance with the relevant policy terms. Petitioner Hartford Accident & Indemnity Company's policy, which is typical of insurance provisions involved in asbestos claims, provided:

> This insurance applies only to bodily injury . . . which occurs during the policy period. Op., Appendix A, at 39a.

In the name of reasonable expectations, the court in effect rewrote this language to say:

> This insurance may apply to any bodily injury regardless whether it occurs before, during or after the policy period.

As a matter of legal doctrine, the court's application of a reasonable expectations analysis to vary policy terms in a commercial insurance context blazed a trail never traveled by any state or federal court.[7]

Some courts have relied on the reasonable expectations of consumers to adjudicate their insurance rights. In particular, they have done so in three major areas.[8] First, in consumer insurance contracts, certain terms have been struck down as unconscionable.[9] Second, also

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[7] Significantly, in a *sua sponte* modification of the *Keene* decision issued December 21, 1981, the District of Columbia Circuit altered the text of a footnote, replacing the phrase, "the reasonable expectations of Keene" with the phrase, "the expectations that Keene could have reasonably formed, as an objective matter, on the basis of the policies' language." This unsubtle attempt to lend a semblance of legitimacy to the court's novel mode of analysis of course leaves the court's remarkable rulings fully intact.

[8] These cases are classified and discussed in Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L. Rev. 961 (1970); Keeton, *Reasonable Expectations in the Second Decade*, 12 Forum 275 (Fall 1976).

[9] *See, e.g., C&J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Ia. 1975); *Struble v. Occidental Life Ins. Co.*, 265 Minn. 26, 120 N.W.2d 609 (1963).

generally in consumer contracts, certain terms have been voided on the ground that the insured could not reasonably have had knowledge of them.[10] Third, insurance terms have been varied in light of representations made by agents with actual or apparent authority.[11] The Restatement of Contracts, Second similarly limits application of reasonable expectations analysis to contexts such as these.[12] In sum, reasonable expectations analysis reflects a policy of protecting unsophisticated individuals and entities in their dealings with larger and more knowledgeable insurance companies.[13]

That policy is not applicable to the present case where the insured is a large commercial venture which procures its insurance through sophisticated insurance brokers, employs in-house staff to deal with insurance matters, and has ample legal talent readily available. In such a

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[10] *See, e.g., Smith v. Westland Life Ins. Co.*, 15 Cal.3d 111, 123 Cal. Rptr. 649, 539 P.2d 433 (1975); *Gerhardt v. Continental Ins. Co.*, 48 N.J. 291, 225 A.2d 328 (1966).

[11] *See, e.g., C&J Fertilizer, Inc.*, note 9, *supra; Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 208 A.2d 638 (1965).

[12] Restatement of Contracts (Second), § 237, Comment f (Tent. Draft No. 5, 1970); *see also* Uniform Commercial Code § 2-302 (1977 version), Official Comment 1.

[13] The cases cited by the panel in support of its reasonable expectations approach all implement this policy concern: *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 869-70, 27 Cal. Rptr. 172, 176-77, 377 P.2d 284, 288-89 (1962) (where airport life insurance vending machine prevented insured from reading policy prior to purchasing it, insured not bound by terms he could not have reasonably anticipated); *Allen v. Metropolitan Life Ins. Co.*, note 11, *supra*, (provision in life insurance premium receipt limiting coverage not binding in the face of contrary representations by insurer's agent); *Collister v. Nationwide Life Ins. Co.*, 479 Pa. 579, 388 A.2d 1346 (1978), *cert. denied*, 439 U.S. 1089 (1979) (purchaser of life policy could reasonably believe that coverage began when insurance agent received first premium, in spite of contrary language in premium receipt).

situation, state law—including the law of those jurisdictions most relevant to the interpretation of Keene's insurance contracts [14]—holds that a reasonable expectations approach cannot be relied upon to vary policy terms.[15] Therefore, in employing a reasonable expectations analysis to override the terms of the insurance policies purchased by Keene, the District of Columbia Circuit Court circumvented the *Erie* doctrine.

---

[14] The court below found:

> Keene is incorporated in Delaware, [and] has its principal place of business in New York . . . . INA is incorporated in Pennsylvania and has its principal place of business in Pennsylvania. Aetna is incorporated in Connecticut and has its principal place of business in Pennsylvania. Hartford is also incorporated in Connecticut and has its principal place of business in Connecticut. And Liberty is incorporated in Massachusetts and has its principal place of business in Massachusetts. Op. at 10a-11a n.10.

[15] *See, e.g., Brokers Title Co. v. St. Paul Fire & Marine Ins. Co.*, 610 F.2d 1174 (3d Cir. 1979) (applying Pennsylvania law) (reasonable expectations inapplicable to commercial "errors and omissions" insurance policy where insured's president knew of disputed clause, which was not unconscionable, even though he may not have understood policy language); *Di Santo v. Enstrom Helicopter Corp.*, 489 F. Supp. 1352, 1364 (E.D. Pa. 1980) (applying Pennsylvania law) ("reasonable expectations rule is inapplicable" to commercial insurance contract negotiated on insured's behalf by professional insurance broker); *Markline Co. v. Travelers Ins. Co.*, Mass. Adv. Sh. 1686 (Sup. Jud. Ct. Mass., July 27, 1981) (refusing to apply reasonable expectations analysis to vary terms of commercial burglary insurance policy); *Skandia America Reinsurance Corp. v. Schenck*, 441 F. Supp. 715, 723 (S.D.N.Y. 1977) (applying New York law) ("rules for the construction of insurance contracts do not differ from those to be applied for the construction of other contracts, particularly when the contract in question is freely negotiated and not one of adhesion.")

A. Under the Guise of Its "Reasonable Expectations" Analysis, the *Keene* Court Refused to Allocate Liability on a Pro Rata Basis Among the Various Insurers and Keene as a Self-Insurer, as Is Required by Basic, Uniform and Controlling Principles of State Insurance Law.

The *Keene* court further disregarded the *Erie* mandate when it ignored applicable state law in refusing—over the vigorous dissent of Judge Wald—to prorate liability among the various parties "on the risk." Most egregiously, it ruled that Keene was entitled to insurance coverage even for periods in which it had purchased inadequate insurance or no insurance at all. In support of this startling conclusion, Judge Bazelon, purporting once again to divine Keene's "reasonable expectations," opined:

> Keene did not expect, nor should it have expected, that its security was undermined by the existence of prior periods in which it was uninsured, and in which no known or knowable injury occurred. . . .
>
> There is *nothing* in the policies that provides for a reduction of the insurer's liability if an injury occurs only in part during a policy period. As we interpret the policies, they cover Keene's entire liability once they are triggered. . . . We have no authority upon which to pretend that Keene also has a "self-insurance" policy that is triggered for periods in which no other policy was purchased. Even if we had the authority, what would we pretend that the policy provides? What would its limits be? There are no self-insurance policies, and we respectfully submit that the contracts before us do not support judicial creation of such additional insurance policies. Op. at 26a, 27a. (Emphasis in original.)

This analysis is contrived and simply wrong: the policy language at issue in *Keene* limited liability to bodily injury "which occurs during the policy period." [16] Further-

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[16] See p. 6, *supra*.

more, well-established case law—again including specific law that controls Keene's policies[17]—squarely supports both the general principle that an insurer is not liable for injuries occurring outside its policy period, and the related principles of apportionment and self-insurance.[18]

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[17] *See* note 14, *supra*.

[18] *See, e.g., Home Mut. Ins. Co. v. Hosfelt*, 233 F. Supp. 368, 370 (D. Conn. 1962) (applying Connecticut law) (under policy providing protection against "accidents which occur during the policy period," insurer not liable for post-policy accidents resulting from causes arising during policy period); *Clauss v. American Ins. Co.*, 287 F.2d 873, 875 (3d Cir. 1961) (no citation of authority but apparently applying Pennsylvania law) (court refuses to "distort normal meaning" of provision specifying that "this policy applies only to accidents or occurrences which take place during the policy period" and upholds insurer's defense based on that provision); *Export S.S. Corp. v. American Ins. Co.*, 106 F.2d 9, 11-12 (2d Cir. 1939), *aff'd on rehearing*, 108 F.2d 1013 (2d Cir.), *cert. denied*, 309 U.S. 686 (1940) (citing, *inter alia*, New York law) (holding that insurer not liable for loss after policy term "however inevitable the loss may have been from causes operating during the term," and that successive insurers share liability ratably based upon damage incurred during their respective policy periods); *City of Virginia Beach v. Aetna Cas. & Surety Co.*, 426 F. Supp. 821, 826 (E.D. Va. 1976) (insurer liable solely for portion of damage occurring during those periods its policies were in effect); *Aetna Life Ins. Co. v. Maxwell*, 89 F.2d 988, 992 (4th Cir. 1937) (insurer only liable for that portion of damage resulting from medical malpractice during time its policy covered physician). *Cf. Transamerica Ins. Co. v. Bellefonte Ins. Co.*, 490 F. Supp. 935 (E.D. Pa. 1980) (applying Pennsylvania, New York and New Jersey law) (two insurers each liable for injurious occurrences arising during their respective policy periods). *See generally Annotation*, 57 A.L.R.2d 1385 and cases collected therein.

Those cases cited by the *Keene* panel in support of its novel holding, *Snapp v. State Farm Fire and Casualty Co.*, 206 Cal. App.2d 827, 25 Cal. Rptr. 44 (1962); *Harman v. American Casualty Co.*, 155 F. Supp. 612 (S.D. Cal. 1957); and *Pruitt v. Hardware Dealers Mutual Fire Insurance Co.*, 112 F.2d 140, 142 (5th Cir. 1940), are simply inapposite. The courts in these property damage cases confronted situations in which an event within the policy period caused damage which continued and worsened *after* the

The inventive result reached under the guise of "reasonable expectations" by the *Keene* panel, Home submits, can best be understood as an improper exercise in judicial policy-making, with the predetermined objective of absolving the manufacturer from all liability.

Judge Bazelon's refusal to apply the established doctrines of apportioned liability and self-insurance contravenes the clear terms of the insurance policies, alters the allocation of relative risks assumed by co-insurers, injects needless confusion and uncertainty into ongoing processes of litigation and settlement, and awards an undeserved windfall to manufacturers of asbestos products. As Judge Wald incisively observed in dissent:

> I just do not understand why an asbestos manufacturer, which has consciously decided not to insure itself during particular years of the exposure-manifestation period, should have a reasonable expectation that it would be exempt from any liability for injuries that were occurring during the uninsured period. It seems to me logical and fair—as it seemed to the Sixth Circuit and to the trial court here—to distribute the ultimate financial responsibility on a pro rata basis among the various insurance companies on line during the risk period, and to include Keene as a self-insurer for the years when it failed to take out any insurance. . . . If the risk is to be shared only by the insurance companies, a manufacturing company that purchased insurance intermittently during the risk period would be as

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policy period. These decisions therefore do not even analogously support *Keene's* holding that a carrier such as Hartford Indemnity & Casualty Company or Home can be liable for injury to lung tissue that occurred *before* its policy period. Furthermore, in *Snapp*, *Harman* and *Pruitt* the insurer had terminated or cancelled its policies despite (or because of) the recognition that damages would continue to accrue. The situation in the instant case is quite to the contrary: here the actions or omissions of Keene, the insured, were solely responsible for all gaps in insurance coverage.

secure as those prudent companies that continually purchased insurance. Op. at 44a-45a.

In view of the *Keene* opinion's freewheeling disregard of its obligation to apply pertinent state law, and in view of its unwarranted refusal to allocate liability among all properly accountable parties, Home respectfully submits that this Court should review and reverse the *Keene* decision.

B. Even if the "Reasonable Expectations" Analysis Had Been Legally Appropriate, Record Evidence Squarely Refutes the Court's View of the Insured's "Reasonable Expectations."

What is perhaps most remarkable about the *Keene* decision is that the record evidence thoroughly repudiates the court's assessment of Keene's "reasonable expectations." The present and former Keene employees who testified (by deposition) in the District Court voiced Keene's authentic "expectations" regarding its insurance coverage, and their statements flatly contradict the conclusions of the court. For example, Keene's assistant treasurer, Philip Feick, who was in charge of Keene's insurance, testified that if the policies were interpreted on an exposure basis, as he had believed they should be, an insurer would not be liable for injuries due to exposures occurring before its policy took effect.[19] Keene's treasurer, Robert Prata, testified to similar effect: "I think if the exposure period was outside the year of coverage by a carrier, the carrier would not have the liability." Prata Deposition at 3209, reprinted in the Joint Appendix below.

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[19] The pertinent portion of Mr. Feick's testimony was as follows:

A. . . . Liberty Mutual shouldn't be liable.

Q. Why not?

A. Because they only started in 1974 and they finished manufacturing the product in 1973. That didn't make any sense to me.

Feick Deposition at 304-305, reprinted in the Joint Appendix below.

II. THE COURT SHOULD GRANT THE WRIT BECAUSE THE *KEENE* DECISION HAS CREATED A DIRECT CONFLICT OF AUTHORITY AMONG THE CIRCUIT COURTS, SERIOUSLY AND ADVERSELY AFFECTING THE ORDERLY ADMINISTRATION OF JUSTICE.

This Court has recognized the appropriateness of granting the writ of certiorari "when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter" or when there are other "special and important reasons therefor." Supreme Court Rule 17. Surely the instant case merits the attention of this Court under that standard. In addition to its serious internal deficiencies of logic and method, the *Keene* decision has created a sharp conflict of authority among the Circuit Courts of Appeal[20] and has spawned a host of adverse practical consequences that burden lower federal courts and litigants alike.

There are several thousand asbestos lawsuits pending in the federal courts. Before *Keene*, the decisions of the Sixth and Fifth Circuits in *Forty-Eight Insulations* and *Porter*, respectively, exhibited a sound evolving consensus within the federal courts that a given insurer's liability in asbestos suits should be determined on a pro rata basis, according to the amount of injurious exposure that occurred during its policy periods.[21]

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[20] This conflict is not "merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938). Instead, as demonstrated under sections I. A. and B., *supra*, the conflict results from the *Keene* panel's departures from basic common law principles that are uniform from state to state.

[21] The sole note of discord in this pre-*Keene* consensus was the district court decision in *Eagle-Picher Industries, Inc. v. Liberty Mut. Ins. Co.*, 523 F. Supp. 110 (D. Mass. 1981), *appeals docketed*, Nos. 81-1761-1763 (1st Cir. Sept. 25, 1981), which held that an insurer's liability should be gauged with reference to the time asbestos-related illness manifests itself.

Given the District of Columbia Circuit's aberrant ruling expanding insurer liability, however, the federal courts of appeal no longer concur on the proper construction of the virtually identical contract language that is at issue in all the asbestos lawsuits. Consequently, identical cases will be decided differently in different federal courts, even though controlling state law principles are the same in each case.

This anomalous situation—so clearly undesirable from a doctrinal perspective—fosters adverse practical consequences. It encourages forum-shopping by litigants between different federal courts as well as between federal and state courts. It denies insurers a clear and certain basis upon which to gauge liabilities and settle claims, and thereby promotes needlessly confused, cumbersome and protracted litigation, which can be expected to occupy the federal courts—as well as insurers such as Home—well into the future. In sum, it creates a situation highly adverse to the principled and efficient resolution of the thousands of current and future asbestos-related death, disability and insurance claims.

Given the magnitude of the rights and interests at stake in the asbestos insurance controversy and the deleterious effects conflicting Circuit Court decisions are having on the administration of justice in the federal courts, there is every reason for this Court to exercise its jurisdiction to correct the errors of the *Keene* panel and resolve the conflict of authority within the federal judicial system.

CONCLUSION

An authoritative pronouncement of this Court on the issues canvassed herein, far from being an improvident exercise of the highest judicial power, would provide the measure of uniformity and certainty sought by all affected segments of the insurance industry—primary carriers as well as excess carriers, proponents of the "manifestation rule" as well as proponents of the "exposure rule." Amicus Home therefore joins with insurers of divergent interests in respectfully urging this Court to grant the writ of certiorari and review the *Keene* decision.

Respectfully submitted,

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Dated: January 12, 1982

CERTIFICATE OF SERVICE

I, Roger E. Warin, counsel of record for *amicus curiae* The Home Insurance Company, hereby certify that on this 12th day of January, 1982, three copies of the foregoing Motion for Leave to File Brief *Amicus Curiae* and Brief of *Amicus Curiae* The Home Insurance Company in Support of Petitions for a Writ of Certiorari were hand-delivered to

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I further certify that all parties required to be served have been served.

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Petition

RECEIVED
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SUPREME COURT, U.S.

Nos. 81-1012 and 81-1197

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

INSURANCE COMPANY OF NORTH AMERICA,

Petitioner,

vs.

KEENE CORPORATION,

Respondent.

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Petitioner,

vs.

KEENE CORPORATION,

Respondent.

On Petitions for Writs of Certiorari to
United States Court of Appeals for the
District of Columbia Circuit

MOTION OF INSURANCE COMPANY OF NORTH AMERICA TO DEFER CONSIDERATION OF PETITIONS FOR WRITS OF CERTIORARI

Insurance Company of North America ("INA"), petitioner in No. 81-1012 and a served party in No. 81-1197, in which the petitioner is Hartford Accident & Indemnity Company ("Hartford"), requests that the Court defer consideration of both petitions for the time being. The reasons for this request are:

1. Both the petition in No. 81-1012 and the petition in 81-1197 request review of the same Judgment and

Opinion of the Court of Appeals for the District of Columbia Circuit.

2. There are, in addition to INA and Hartford, two other parties who are also adversely affected by the same Judgment and Opinion -- Aetna Insurance Company ("Aetna") and Liberty Mutual Insurance Company ("Liberty").

3. Aetna will be filing its certiorari petition by Monday, January 11, 1982, and Liberty has already informed the Court that it will file its petition during the week of January 11, 1982.[1/]

4. In these circumstances, it would appear that all four petitions (together with any motions for leave to file amicus briefs) should be considered by the Court at the same time. Such consideration will not only conserve the time of the Court but will assure that the Court has the benefit of the views of all affected parties in determining whether to grant certiorari in this matter.

5. Finally, it should be noted that neither respondent Keene Corporation nor any other party will be prejudiced by the short delay that is being requested. None of the petitions for certiorari was due until February 18, 1982, ninety days after the denial of petitions for rehearing. 28 U.S.C. § 2101(c). By letter to the Clerk dated December 15, 1981, Keene Corporation asked for and was given an extension of time to and including January 29, 1982, to respond to the petition in No. 81-1012.[2/] And, by letter to the Clerk, dated

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1/ See Motion of Liberty Mutual Insurance Company to Defer Consideration of Certiorari Petitions and Amici Motions, filed on January 6, 1982. INA agrees with and supports that motion.

2/ See letter from Jerold Oshinsky, Attorney for Keene Corporation, to the Clerk of the Court, December 15, 1982, and response from Clerk of the Court to Mr. Oshinsky, December 16, 1981.

[Footnote Continued on Next Page]

December 22, 1981, Hartford has already urged that the distribution of the petitions in this case be deferred until all of the parties have had an opportunity to file their petition.[3/]

CONCLUSION

For the foregoing reasons, the Court should defer consideration of the petitions in No. 81-1012 and No. 81-1197 until the Aetna and Liberty petitions have been filed and should consider all four petitions, together with any timely filed amicus briefs, at the same time.

Respectfully submitted,

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January 6, 1982

[Footnote Continued from Preceding Page]

Curiously, just two days after receiving the extension it requested, Keene Corporation, by letter dated December 18, 1981, waived its right to respond to the petition in No. 81-1012. (By letter dated December 29, 1981, Keene Corporation has also waived its right to respond to the petition in No. 81-1197.) The purpose of these unusual actions by Keene Corporation appears to have been to obtain piecemeal review of the decision below, thereby decreasing the chance that certiorari will be granted.

3/ See letter from John P. Arness, Attorney for Hartford Accident & Indemnity Company, December 22, 1981.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 1982, one copy of the foregoing motion was mailed, postage prepaid, to each of the counsel named below. I further certify that all parties required to be served have been served.

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Petition

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Nos. 81-1012 and 81-1197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

MOTION OF LIBERTY MUTUAL INSURANCE COMPANY TO DEFER CONSIDERATION OF CERTIORARI PETITIONS AND AMICI MOTIONS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 81-1012 and 81-1197

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

MOTION OF LIBERTY MUTUAL INSURANCE COMPANY TO DEFER CONSIDERATION OF CERTIORARI PETITIONS AND AMICI MOTIONS

Liberty Mutual Insurance Company ("Liberty") moves that consideration of the *certiorari* petitions identified in the caption and immediately below, and of the *amici* motions identified below, be deferred briefly so that all related matters covered therein, and related matters in a *certiorari* petition soon to be filed by Liberty, may be considered together.

On November 30, 1981 the Insurance Company of North America ("INA") filed in this Court a petition for a writ of certiorari to review the Judgment and Opinion of the United States Court of Appeals for the District of Columbia Circuit entered on October 1, 1981 (Consolidated Nos. 81-1179, 81-1180, 81-1181 and 81-1182

in that Court). On December 24, 1981 Hartford Accident & Indemnity Company ("Hartford") filed a petition (No. 81-1197 in this Court), seeking a review of that same Judgment and Opinion. Before doing so, Hartford, by letter, requested the Court to consider together all petitions filed and to be filed in this matter. Liberty, which was also a party in that District of Columbia proceeding, understands, however, that there is a possibility that the Court may soon consider the petitions filed by INA and Hartford.

On December 30, 1981 Commercial Union Insurance Company ("Commercial Union") filed a motion for leave to file a brief as *amicus curiae*, with such a brief, in No. 81-1012.

Liberty has just received service of a motion for leave to file a brief as *amicus curiae* with such a brief, in No. 81-1012, filed by American Home Insurance Company and other insurance companies, concerning the same matters.

Liberty is informed that Aetna Insurance Company ("Aetna"), a party in the District of Columbia proceeding, will file a petition for a writ of certiorari, also seeking a review of the same Judgment and Opinion, by Monday, January 11, 1982.

In Liberty's opinion all of the petitions and motions referred to contain matters which are best considered together, and the petition to be filed by Liberty will also contain such matters. Liberty plans to file its petition during the week of January 11, 1982. Liberty's petition will contain a discussion of the failure of the United States Court of Appeals for the District of Columbia Circuit to rely on specifically applicable state decisional law.

Because of the interrelationship of the various petitions and motions and the desirability that the Court's

attention be invited to the specifics of state law, Liberty respectfully requests that the Court defer consideration of the petitions in 81-1012 and 81-1197 and of the *amici* motions until such time as all *certiorari* petitions are before this Court.

Respectfully submitted,

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Opposition

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Nos. 81-1012 and 81-1197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S OPPOSITION TO MOTIONS BY LIBERTY MUTUAL INSURANCE COMPANY AND INSURANCE COMPANY OF NORTH AMERICA TO DEFER CONSIDERATION

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Nos. 81-1012 and 81-1197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

v.

KEENE CORPORATION,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S OPPOSITION TO MOTIONS BY LIBERTY MUTUAL INSURANCE COMPANY AND INSURANCE COMPANY OF NORTH AMERICA TO DEFER CONSIDERATION

INTRODUCTION

Respondent Keene Corporation ("Keene") submits this brief in opposition to the motions by Liberty Mutual Insurance Company and Insurance Company of North America ("INA") to defer consideration of the *certiorari* petitions and *amici* motions.

REASONS FOR DENYING THE MOTIONS

For the following reasons, the motions to defer should be denied:

1. *The case is not certworthy.* Keene informed the Clerk of the Court on December 18 and 29, 1981 that it would not file a brief in opposition to the petitions for *certiorari.* The decision

below involves state law questions of insurance coverage for asbestos tort cases and does not present any federal questions. This Court normally will not review a holding of a court of appeals on a matter of state law.[1] *Ruhlin* v. *New York Life Insurance Co.*, 304 U.S. 202 (1938); *Pierson* v. *Ray*, 386 U.S. 547, 558 (1967); *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).

Petitioner, Hartford Accident & Indemnity Co. ("Hartford"), stated to this Court in opposition to *certiorari* in another asbestos insurance coverage case that "considered determinations of state law by these intermediate appellate courts present no question worthy of review by this Court."[2] Hartford further stated to this Court that "[a] decision by this Court on these narrow state law issues would not bind other states and accordingly would have no nationwide significance."[3]

As the Travelers Indemnity Company of Rhode Island told this Court:

> The risk of inconsistent applications of identical policy terms is a risk assumed by every insurer that transacts business in more than one state.[4]

There is no reason to delay consideration of petitions which so clearly fall short of the applicable criteria for granting *certiorari*.[5]

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[1] The current version of this Court's Rule 17 omits any reference to a court of appeals decision that resolves "an important state or territorial question in a way in conflict with applicable state or territorial law." Former Rule 19 contained such a reference.

[2] Hartford's *amicus curiae* brief opposing *certiorari* (at 3) in *Insurance Company of North America* v. *Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, Nos. 78-1332-26 (Mar. 6, 1981), *cert. denied*, 50 U.S.L.W. 3466 (Dec. 7, 1981), *("Forty-Eight")*.

[3] Hartford's brief opposing *certiorari* (at 7) in *Porter* v. *American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3466 (Dec. 7, 1981), ("Porter").

[4] Brief of Travelers Indemnity Company of Rhode Island in opposition to *certiorari* in *Forty-Eight*, at 14.

[5] *American Motorists Insurance Co.* v. *E.R. Squibb & Sons*, 95 Misc. 2d 222, 406 N.Y.S. 2d 658 (Sup. Ct. 1978), is not a complete statement of New York law. *See Emons Industries, Inc.* v. *Liberty Mutual Insurance Co.*, 481 F. Supp. 1022 (S.D.N.Y. 1979); *Schultheis* v. *Centennial Insurance Co.*, ____ Misc. 2d ____, 438 N.Y.S. 2d 687, 689 (Sup. Ct. 1981).

2. *Delay should be denied for the same reasons this Court refused to defer consideration of Forty-Eight and Porter and denied certiorari in Forty-Eight and Porter.* Petitions for *certiorari* were denied on December 7, 1981 in two other cases which involved state law questions of insurance coverage for asbestos tort cases. (81-198-*Insurance Company of North America* v. *Forty-Eight Insulations, Inc.*, 50 U.S.L.W. 3466; 81-199-*Liberty Mutual Insurance Co.* v. *Forty-Eight Insulations, Inc.*, 50 U.S.L.W. 3466; 81-200-*Aetna Casualty and Surety Co.* v. *Porter*, 50 U.S.L.W. 3466. On the same day this Court denied a deferral motion by INA seeking to have the petitions for *certiorari* in *Forty-Eight* and *Porter* considered together with the petitions in this case (*id.*).

Based on this Court's denial of INA's motion in *Forty-Eight* and *Porter* coupled with its denial of *certiorari* in those cases, the present motions to defer consideration should be denied.

3. *The petitions are ripe.* Keene does not presently intend to file a brief in opposition to any petition for *certiorari* in this case. Thus, each petition is ripe for consideration on its own merits and delay is unwarranted.

4. *The case has been expedited by the lower courts and by some of the parties here.* There should be no delay for the further reason that this case repeatedly has been accelerated by the courts below:

(a) The District Court certified its decision for appeal *sua sponte*.

(b) The Court of Appeals granted motions by Keene and Liberty Mutual for an expedited appeal.

(c) INA and Keene sought expedited treatment of the Court of Appeals' consideration of the petitions for rehearing and suggestions for *en banc* consideration filed by the insurance companies.

(d) INA filed its petition for *certiorari* eleven days after the Court of Appeals denied the petitions for rehearings and *en banc* suggestions.

(e) Keene expeditiously informed the Clerk of this Court that it would not file briefs in opposition to the petitions for *certiorari*.

5. *There is no conflict.* Deferral should be denied because there is no conflict among the *Keene*,[6] *Forty-Eight*, *Porter* and *Eagle-Picher*[7] decisions. Each decision reflected the factual record presented. Since the *Keene* decision, one district court has considered whether the decisions are in conflict and pointed out that "[m]y holding accords with that of each circuit which has reached the issue." *Commercial Union Insurance Companies* v. *Pittsburgh Corning Corp.*, No. 81-2129, E.D. Pa., December 4, 1981, Slip op. at 25.[8]

The efforts of the insurance companies to federalize insurance coverage matters contrast with their usual efforts to avoid federal oversight. *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1012-1015, and, particularly, 1945 U.S. Code Cong. Service 670, 672-673.

6. *The decision below is correct.*

(a) Coverage

The District of Columbia Circuit held: "Once triggered, each policy covers Keene's liability." Slip op. at 27. The *Keene* holding simply restates the insuring clause of the standard comprehensive general liability insurance policies which "provide[s] that the insurance company will pay on behalf of Keene 'all sums' that Keene becomes legally obligated to pay as damages because of bodily injury during the policy period." Slip op. at 24.

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[6] *Keene Corporation* v. *Insurance Company of North America*, Nos. 81-1179 to -1182 (D.C. Cir., Oct. 1, 1981).

[7] *Eagle-Picher Industries, Inc.* v. *Liberty Mutual Insurance Co.*, Civ. No. 78-2739-Z (D. Mass. Aug. 14, 1981), *appeals docketed*, Nos. 81-1761 to -1763 (1st Cir.).

[8] Parties and *amici* citing *Brokers Title Co.* v. *St. Paul Fire & Marine Insurance Co.*, 610 F.2d 1174 (3d Cir. 1979), and similar cases, have failed to cite *Commercial Union Insurance Company* v. *Pittsburgh Corning Corp.*, 81-2129, E.D. Pa., December 4, 1981, which held in the specific context of an asbestos insurance coverage case that the courts will not "balance the economic resources of the parties to insurance contracts." (Slip op. at 9).

A copy of the *Pittsburgh Corning* opinion appears at Appendix A to Keene's Opposition to Motion for Leave to File Brief *Amicus Curiae* of Commercial Union Insurance Companies.

The insurance companies in this case and other insurance companies, *ante litam motam,* applied the principles enunciated in *Keene* as a matter of business practice. The record in *Keene* demonstrates that the insurance industry acknowledged in a 1977 meeting the "all sums" legal liability principle advocated by Keene and adopted by the court of appeals:

> The majority view was that the coverage existed for each carrier thoughout [sic] the period of time the asbestosis condition developed, i.e., from the first exposure through the discovery and diagnosis. The majority also contended that each carrier on risk during any part of that period could be fully responsible for the cost of defense and loss. The majority relied on *Borel* v. *Fibreboard Paper Products Corporation,* 493 F.2d 1076, U.S. Court of Appeals, Fifth Circuit (applying Texas law).

American Insurance Association and American Mutual Insurance Alliance Memorandum, dated May 20, 1977 (*Keene* J.A. III at 987).

Keene also held that the insurance policies cover the policyholder's legal liability in full without proration of any damages or defense costs to the policyholder. The court stated: "As we interpret the policies, they cover Keene's *entire* liability once they are triggered" (slip op. at 27, emphasis added).

The impermissibility of prorating expenses to the policyholder has been recognized by the insurance companies, as demonstrated by numerous examples in the *Keene* record. In 1964, the insurance industry draftsmen of the standard policy language explained:

> [P]rorating cannot be effectuated between the insurer and the claimant. Between two insurers, of course, they would prorate.

Minutes of September 21-23, 1964 Joint Forms Committee of Mutual Insurance Rating Bureau and National Bureau of Casualty Underwriters (*Keene* J. A. V. at 1807).

The general counsel for Hartford concurred in a sworn statement in a New York federal court:

> No serious argument can be made in favor of prorating coverage for multitudes of individual claimants over 10 to 20 years.

Affidavit and Attached Memorandum of Richard A. Schmalz at 8 (filed in *Schering Corp.* v. *The Home Insurance Co.*, No. 79-C-2817 (E.D.N.Y.), and referenced in Keene's Reply Brief in the Court of Appeals in *Keene*, at 9).

(b) Adhesion Principles

The decisions of the Courts of Appeals in *Forty-Eight*, (633 F.2d at 1222), *Porter* (641 F.2d at 1145), and *Keene* (slip. op. at 12) each found the standard insurance industry policy language ambiguous and, as required by state law principles, construed the ambiguities against the insurance companies.

Even if there is a difference among the insurance coverage decisions below, there is no requirement that contracts of adhesion, such as standard insurance policies, be construed the same in different cases that involve different facts. *See Corbin, Contracts* § 554 p. 219 n.60 (1960).

(c) Burden of Proof

The burden of proof rule adopted in *Keene*, *Forty-Eight* and *Porter* is exactly that espoused by Hartford. In its *amicus curiae* brief in the Sixth Circuit in the *Forty-Eight* case, Hartford stated that "an insurer which can demonstrate in any particular case that no bodily injury occurred during its policy period despite exposure to asbestos would not be liable." (at 5)

Travelers Indemnity of Rhode Island in its brief in opposition to *certiorari* in *Forty-Eight* stated with respect to the burden of proof:

> Hence, reason and common sense, in accordance with state principles of jurisprudence and in special circumstances where liability is indicated, may call for a change in the allocation of the usual burden of proof.

> The Sixth Circuit's decision reflects such reason and common sense because it logically follows the underlying theory of liability.[9]

The Hartford position, which was adopted in *Forty-Eight, Porter* and *Keene,* accords with state law. *See American States Insurance Co. v. Aetna Life & Casualty Co.* 379 N.E.2d 510 (Ind. App. 1978); *International Paper Co. v. Continental Casualty Co.,* 35 N.Y.2d 322, 361 N.Y.S.2d 873, 320 N.E.2d 619 (1974); *Clarke v. Fidelity and Casualty Co. of New York,* 285 N.Y.S.2d 503, 55 Misc.2d 327 (Sup. Ct. 1967).[10]

This case should not be delayed because the three circuits below did exactly what Hartford suggested in the Sixth Circuit with respect to the burden of proof.

7. *A split in the insurance industry does not warrant delay.* The briefs filed by insurance companies in this Court in *Forty-Eight, Porter* and this case tell a graphic story. No court can please all of the insurance companies. On the other hand virtually every policyholder supports the *Keene* decision.

The insurance company hyberbole about the purported unforeseeability of the current volume of tort liability cases should be discounted. An insurance industry participant in the drafting of the standard comprehensive general liability insurance policy form acknowledged in 1966 that "'[e]xperts project that in the next decade products liability litigation will exceed automobile accident cases in our courts'". Gowan, *Completed Operations and Products Liability Insurance Coverage of the New Comprehensive General Automobile Policy,* American Bar Association Section of Insurance, Negligence and Compensation Law (1966), at 265.

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[9] Brief of Travelers Indemnity Company of Rhode Island in opposition to *certiorari* in *Forty-Eight* at 8.

[10] The burden of proof issue was raised in the petitions for *certiorari* in *Forty-Eight* and *Porter.* As noted above, *certiorari* was denied in those cases. In an analogous context in *Sindell v. Abbott Laboratories,* 26 Cal.2d 588, 607 P.2d 924, 163 Cal.Rptr. 132, *cert. denied,* 449 U.S. 912 (1980), the petitioners argued that the court below had reversed the ordinary burden of proof but this Court recently denied *certiorari.*

The "chamber of horrors" characterizations aside, the insurance industry can and probably will get down to the business of handling the asbestos cases when the courts write "finish" to the coverage disputes. Travelers sounded a more reasonable note:

> The resolution of the perplexing insurance issues created by the asbestos health problem, a problem that was not created by the insurance industry, can best be achieved, not through the kind of judicial legislation for which the petitioners call, but through the creative and voluntary efforts of manufacturers and insurers. All parties have more than enough incentives to resolve their disputes without calling upon the federal courts for the "easy" answers the courts cannot provide.[11]

The Court should facilitate the resolution of the insurance issues by denying the requests for delay.

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[11] Brief of Travelers Indemnity Company of Rhode Island in opposition to *certiorari* in *Forty-Eight*, at 18.

CONCLUSION

For the foregoing reasons, Keene requests that the motions of Liberty Mutual Insurance Company and INA to defer consideration of *certiorari* petitions and *amici* motions be denied.

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